INDEX

	Page
Motion for 12 Man Jury and Order Denying Same	1
Petition for Writ of Mandamus	2
Answer and Return of Respondent, United States District Judge Battin	5
Answer and Return of Respondent, State Farm Mutual Automobile Insurance Company	21
Opinion and Order of United States Court of Appeals for the Ninth Circuit, Denying Writ of Mandamus	23
United States District Court for the District of Montana, Rule 13(d)1	28
Certificate of Service	29

CHRONOLOGICAL LIST OF PERTINENT DOCKET DATES

U.S. District Court for the District of Montana:

September 22, 1971	Motion for 12 Man Jury and Order Denying Request for 12 Man Jury
October 5, 1971	Order Vacating Trial Date Subject to Court of Appeals Ruling

U.S. Circuit Court of Appeals for the Ninth Circuit:

October 4, 1971	Petition for Writ of Mandamus
October 13, 1971	Order Staying Jury Trial in District Court
November 10, 1971	Answer and Return of Respondent, U.S. District Judge Battin
December 14, 1971	Answer of Respondent State Farm Mutual Automobile Insurance Company
March 6, 1972	Opinion and Order Denying Writ of Mandamus

U.S. Supreme Court:

May 4, 1972	Petition for Writ of Certiorari
October 10, 1972	Order Granting Certiorari

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

ROLAND V. COLGROVE,

Plaintiff,

Civil No. 783

-vs-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and WAYNE CALKINS,

Defendants.

* * *

TRANSCRIPT OF MOTION AND RULING OF COURT

PROCEEDINGS

September 22, 1971

1:30 P.M.

...

MR. COLGROVE: I ask you, Your Honor, that you waive the local rule and go on a twelve-man jury, in place of the six-man jury.

THE COURT: The motion and request of counsel for the Plaintiff to waive the local rule requiring a six-man jury in a civil case and abide by rule 48 of the Federal Rules of Civil Procedure is denied. The Court intends to impanel a six-man jury to try the case.

In order to accommodate you, I will set this over to October 12th. I will vacate the trial setting heretofore made of September 27th, at 9:30 A. M., and reset it for October 12th at 9:30 A.M.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 71-2546

ROLAND V. COLGROVE,

Petitioner,

-vs-

HON. JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION,

Respondent.

PETITION FOR WRIT OF MANDAMUS

Comes now Roland V. Colgrove, petitioner and plaintiff above-named, and petitions this court or any judge thereof to issue a writ of mandamus directing the Hon. James F. Battin, Judge of the United States District Court for the District of Montana, Billings Division, to try Civil No. 783 to a trial jury of twelve persons, rather than to a jury of six persons as heretofore ordered by the District Court, pursuant to Rule 13(d)1 of the Revised Rules of Procedure of the United States District Court for the District of Montana.

I.

THE FACTS SUPPORTING THE PETITION ARE AS FOLLOWS:

(1) Rule 13(d)1 of the Revised Rules of Procedure of the United States District Court for the District of Montana became effective on September 1, 1971, and provides:

> "A jury for the trial of civil cases shall consist of 6 persons * * *."

(2) The District Court fixed September 27, 1971 for the commencement of the trial of Civil No. 783 to a trial jury consisting of six persons.

(3) On September 22, 1971, plaintiff moved the court to try Civil No. 783 to a trial jury of twelve persons.

rescheduled the trial of the case to commence on October 12, 1971, to a trial jury of six persons.

II.

THE ISSUES HEREIN PRESENTED ARE AS FOLLOWS:

(1) Williams v. Florida, 26 L.Ed. 2d 446, interpreted only the Sixth Amendment as it related to the number of trial jurors in criminal actions and expressly left undecided whether Congress and the States were prohibited by the Seventh Amendment from reducing trial jurors in civil actions to any number less than twelve.

(2) District Court Rule 13(d)1 is inconsistent with Rule 48 and violates Rule 83.

(3) Congress, having declared that a civil trial jury less than twelve may be had only on stipulation of the parties, conferred upon the parties rights which the District Court may not alter, amend, or repeal by local rule.

III.

THE WRIT SHOULD BE ISSUED FOR THE FOLLOWING REASONS:

(1) A trial on the merits of Civil No. 783, without first determining the validity of local Rule 13(d)1 would needlessly consume judicial time, effort and expense in the trial court and in the appellate court, in the event of an appeal. An appeal by the successful party is almost certain because:

(a) Local Rule 13(d)1 may be unconstitutional as violating the Seventh Amendment relating to civil actions wherein the words "common law" twice appear. The words "common law" are absent from the Sixth Amendment. At common law a trial jury consists of twelve jurors. Williams v. Florida, 26 L.Ed. 2d 446, held that a Florida statute limiting trial jurors to six in criminal cases did not violate the Sixth Amendment, but in Note

30 said in part:

> "While much of our discussion in this case may be thought to bear equally on the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation."

(b) Local Rule 13(d)1 limiting trial jurors to six in civil actions is inconsistent with Rule 48. Under Rule 83, District Courts may make local rules regulating their practice "not inconsistent with these rules." Rule 48 allows the parties to stipulate to a trial jury "of any number less than 12." The language is clear that a panel of twelve jurors is contemplated, making Rule 13 (d)1 inconsistent with Rule 48.

(c) Local Rule 13(d)1 also contravenes Rule 48 by foreclosing a stipulation by the parties of a trial jury consisting of "any number less than twelve", to-wit: Eleven, ten, nine, eight or seven.

WHEREFORE, petitioner prays:

(1) That an order be issued, directed to the Hon. James F. Battin, Judge of the United States District Court for the District of Montana, Billings Division, directing him to vacate his order that Civil No. 783 be tried to a trial jury of six persons and requiring him to try the case to a trial jury of twelve persons.

(2) In the alternative, that an order be issued, directed to the Hon. James F. Battin, Judge of the United States District Court for the District of Montana, Billings Division, requiring him to show cause in this court, at a time to be designated, why he should not vacate his order that Civil No. 783 be tried to a trial jury of 6 persons and why he should not be required to try Civil No. 783 to a trial jury of twelve persons.

(3) That such stay of the trial proceedings fixed by the Honorable District Judge to commence on October 12, 1971,

as may be necessary to enable this court to hear and determine this petition be granted.

(4) That plaintiff have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,
Lloyd J. Skedd
Office and Post Office Address:
P. O. Box 201
Helena, Montana 59601; and
Roland V. Colgrove
Office and Post Office Address:
14 North 9th Street
P. O. Box 550
Miles City, Montana 59301
Attorneys for Plaintiff
By: Roland V. Colgrove

(Certificate of Service omitted)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Title omitted in printing)

ANSWER AND RETURN

I.

Respondent accepts petitioner's statement of facts.

II.

ISSUES

A. Whether Rules 83 and 48, Federal Rules of Civil Procedure, 28 United States Codes, require that Rule 13(d)(1), Revised Rules of Procedure of the United States District Court for the District of Montana, be voided by this court.

B. Whether Rule 13(d)(1), Revised Rules of Procedure of the United States District Court for the District of Montana, violates the Seventh Amendment to the United States Constitution and is therefore unconstitutional.

III.

REASONS WHY THE WRIT SHOULD NOT ISSUE

A. Rule 83, F.R.Civ.P., 28 U.S.C., provides that District Courts may "make and amend rules" governing practice in the respective districts, if those rules are "not inconsistent with these rules." Therefore, for this court to hold that Montana District Court Rule 13(d)(1) cannot stand, it must find that rule inconsistent with one of the Federal Rules of Civil Procedure.

Petitioner alleges that the local rule in question is inconsistent with Rule 48, F.R.Civ.P., 28 U.S.C. That rule is stated as follows:

> "Rule 48. Juries of Less than Twelve--Majority Verdict.
>
> "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Respondent contends that the Montana District Court Rule 13(d)(1) is not inconsistent with Rule 48, F.R.Civ.P., 28 U.S.C. Rule 13(d)(1) reads as follows:

> "Rule 13
>
> "(d) Jury Trials.
>
> "1. A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled."

In Rule 48, Federal Rules of Civil Procedure, Congress did not require that juries be made up of twelve members. Rather, Congress merely provided <u>one</u> way in which a jury of less than twelve members might be properly formed. Congress did not, however, specify in Rule 48 that the only way a jury of less than twelve persons could be formed was by stipulation.

To hold that Rule 48 requires a jury of twelve members is

to put words in the mouth of Congress and attribute something to that rule which is not required and which was not intended. In view of the decision of the United States Supreme Court in Williams v. Florida, 399 U.S. 78 (1970), wherein a Florida rule providing that a six-member jury decide criminal cases was upheld, Respondent's interpretation of Rule 48 has even more support.

The Respondent recognizes that the Supreme Court in Williams indicated that a legislature could find a good reason why a twelve-member jury was preferable. However, the Court stated that its holding

> "... does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." Williams, 399 U.S. at 103.

Because the decision in Williams as to the number of jurors in criminal cases, and by implication in civil cases, in Federal District Court is left to Congress, its intent must rule. Respondent urges this court to rule, based upon the language which Congress chose to use in Rule 48, that it was not the intent of Congress to require in that rule that juries must consist of twelve, and only twelve, persons, unless the parties stipulate to a lesser number. Certainly, had Congress intended this to be the rule, it could have specifically so stated. Instead, Congress elected to use language which can reasonably be construed to show an intent to allow juries of less than twelve persons by means other than stipulation of the parties.

Such an interpretation is further supported by the fact that Congress in writing the criminal counterpart to Rule 48, Rule 23(b), Federal Rules of Criminal Procedure, 18 U.S.C., specifically stated that juries were to be made up of twelve persons.

The Montana District Court is not alone in adopting a six-

man jury rule. As of October 1, 1971, thirty-one districts had put into effect similar rules. As early as January 1, 1971, the District of Minnesota adopted a six-man jury rule for specific types of cases. Chief Judge Edward A. Devitt, District of Minnesota, in an article entitled "The Six-Man Jury in the Federal Court" (hereto attached and marked Exhibit "A"), discussed the propriety of the six-man jury rule. Discussing the Williams case, Judge Devitt stated,

> "It is logical to conclude that if called upon to do so the Supreme Court would take a similar view of the jury trial provision of the Seventh Amendment. It appears highly unlikely that the Court would give a stricter interpretation dealing with civil cases than it now has to the Sixth Amendment provision dealing with criminal trials." Devitt, Page 2, Exhibit "A".

B. Respondent contends that the Constitution of the United States does not require that juries in civil trials consist necessarily of twelve members. The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

While the Supreme Court in Williams, supra, dealt with the meaning of the jury trial provisions of the Sixth Amendment as it pertains to criminal trials, the Court stated in a footnote:

> "While much of our discussion in this case may be thought to bear equally upon the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional

> references to the 'common law' that occur in the Seventh Amendment might support a different interpretation." Williams, 399 U.S. at 92, n. 30.

Respondent submits that these references in the Seventh Amendment to the common law do not mandate a finding that a twelve-member jury is required in civil trials.

The first reference to the common law merely defines the type of case in which the right of jury trial exists. The term "common law" is used to distinguish a "case at law", which traditionally included the right to jury trial, from cases in equity, which traditionally did not include that right. Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 F. 957, 960 (C.C. E.D. Tenn. 1896).

The second reference to the common law in the Seventh Amendment merely assures that decisions of fact made by a jury shall not be reexamined in any court of the United States except according to the established rules of the common law. Baltimore and Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

Clearly, these references to the common law do not pertain to the make-up or nature of the jury itself. Consequently, it is Respondent's contention that the Supreme Court's interpretation of the meaning of the right to trial by jury as it pertains to the Sixth Amendment is completely applicable to the meaning of the right to trial by jury as it pertains to the Seventh Amendment.

The Supreme Court, in Williams, summing up the significance of the number twelve as it applied to the size of a jury, stated:

> "In short, while sometime in the 14th century the size of the jury at common law came to be fixed generally at twelve, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place." Williams, 399 U.S. at 88-90.

In discussing earlier cases which had upheld the theory that

constitutionally a jury must be composed of twelve members, the Supreme Court also noted that none of these cases had discussed an essential step in the support of such a position:

> "... namely, that every feature of the jury as it existed at common law--whether incidental or essential to that institution--was necessarily included in the Constitution wherever that document referred to a 'jury.'" Williams, 399 U.S. at 91.

In a footnote, the Supreme Court found a similar situation existing as to interpretation of civil jury trial requirements:

> "Similarly, cases interpreting the jury trial provisions of the Seventh Amendment generally leap from the fact that the jury possessed a certain feature at common law to the conclusion that that feature must have been preserved by the amendment's simple reference to trial by 'jury.' ... citing cases." Williams, 399 U.S. at 92, n. 30.

Finally, the court recognized that it could not "devine precisely what the word 'jury' imported to the Framers, the First Congress, or the States in 1789." Williams, 399 U.S. at 98. The Court added, however, that there was

> "... absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury. Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. Measured by this standard, the twelve-man requirement cannot be regarded as an indispensable component of the Sixth Amendment."

Williams, 399 U.S. at 99-100.

Respondent urges the court to accept this language as relevant, not only to an interpretation of the Sixth Amendment but also to an interpretation of the Seventh Amendment, and apply the logic of the Supreme Court in Williams to the case at bar.

Respondent recognizes that pre-Williams courts have ruled that a jury in a civil trial must consist of twelve members. E.g., Capital Traction Company v. Hof, 174 U.S. 1 (1899); American Publishing Company v. Fisher, 166 U.S. 464 (1897); Diederich v. American News Co., 128 F.2d 144, 145 (10th Cir. 1942). However, in Baltimore and Carolina Line, Inc., supra, the United States Supreme Court discussed the purpose of the Seventh Amendment and created language which, when considered in view of the Williams decision, supports the contention of Respondent.

There the Court stated:

> "The aim of the [Seventh] Amendment, as this court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." Baltimore, 295 U.S. at 657.

It is the contention of Respondent that the substance of the common law right of trial by jury does not include the requirement that a jury consist of twelve members. Rather, Respondent contends that the interpretation of the right of jury trial guaranteed by the Sixth Amendment applies equally to the right of jury trial guaranteed by the Seventh Amendment, and that therefore a twelve-member jury is not required by the

Constitution. The Constitution merely requires that a jury, of some unstated number, must pass on issues of fact in cases at law.

Many policy arguments exist to support the contentions of Respondent. The extremely crowded conditions of District Court calendars is a well-known fact. A six-man jury system would decrease the time needed for trial. Furthermore, a six-man jury system would substantially reduce the cost to the taxpayer of jury trials. Respondent recognizes that monetary considerations are secondary to considerations of justice. However, where, as here, both justice and financial savings may be achieved, the latter is an appropriate factor for consideration in this matter.

In his article, Judge Devitt discussed financial savings achieved under a six-man jury rule in Minnesota:

> "In the five month period since the rule became effective, the Judges of the Court have tried every case covered by the rule to six-man juries without incident or objection. The twenty-seven civil cases so tried took eighty-nine trial days totaling 524 juror days. The immediately discernable financial savings is substantial. Jurors received statutory compensation of $20.00 per day and an estimated average of $5.00 per day in mileage and expense reimbursement for a total of $25.00 per day. This figure multiplied by the 524 juror days which were saved by the six-man jury rule represents a money saving of $13,100." Devitt, Pages 5-6, Exhibit "A".

In reference to the time saved, Judge Devitt noted that during the same period in which the twenty-seven civil cases were tried, the judges tried sixteen criminal cases and two civil anti-trust cases, not covered by the rule, to twelve-man juries.

Respondent submits, also, that six-member juries present a more workable group for weighing factual determinations. With

the smaller group, it is more likely that a valid, comprehending study of the facts presented will be made by all members of the jury. Better considered judgments are more apt to result. However, the possibility that one man can prevent a verdict from being unanimous, thereby creating a mistrial, still exists with equal force. Consequently, certain advantages appear in the use of a six-man jury, while the normal factors akin to the jury system remain undiminished.

Respondent therefore urges that the court deny the petition for a writ of mandamus, and instead uphold Rule 13(d)(1), Revised Rules of Procedure of the United States District Court for the District of Montana.

Respectfully submitted,
James F. Battin
United States District Judge
For the District of Montana
Billings Division

(Certificate of Service omitted)

EXHIBIT "A"

THE SIX MAN JURY IN THE FEDERAL COURT

BY

EDWARD J. DEVITT, CHIEF JUDGE
U. S. DISTRICT COURT, DISTRICT OF MINNESOTA

The successful use of six-man juries in civil cases in the Federal District Court of Minnesota has resulted in improved efficiency at less cost without sacrifice of legal rights and argues for nationwide employment of juries of less than twelve in civil cases in the federal courts.

The Minnesota experience, although based on a limited period of five months of actual operation, has evoked expressions of complete satisfaction with the innovation from judges, lawyers and litigants, has materially shortened trial time, increased judicial

efficiency and resulted in substantial financial saving to the government in jurors' fees and expenses. The fact that, to date, the plan has been emulated by the adoption of similar six-man jury rules in at least 15 other federal districts and is under study in 19 or more additional districts and that the Judicial Conference of the United States has endorsed in principle the use of smaller juries in civil cases supports the hopeful prognostication that within a short time civil jury issues in the Federal Court System customarily will be tried to juries of less than the traditional twelve.

This marked progress toward improving the efficiency of our court proceedings was made constitutionally permissible by the decision of the United States Supreme Court in its landmark decision, Williams v. Florida, 90 S.Ct. 1893, decided June 22, 1970.

-1-

The Williams decision is historic in that it reversed a long-held view that the "trial by jury" requirement of the Sixth Amendment to the United States Constitution necessitated a twelve-member body. The Court evaluated historical documentation for the assumed sanctity associated with the number twelve (such as Lord Coke's explanation that the "number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.") and concluded that the reasons given in support of the number twelve rest "on little more than mystical or superstitious insights . . ." Williams, p. 1899.

The Court said:

> ". . . the fact the jury at common law was composed of precisely 12 is an historical accident, unnecessary to effect the purpose of the jury system . . . and wholly without significance 'except to mystics.'" Williams, p. 1907.

In overruling the earlier leading decision of Thompson v. Utah, 170 U.S. 343, 18 S.Ct. 620 (1898), the Supreme Court

concluded:

> "We hold that the 12-man panel is not a necessary ingredient of 'trial by jury'." Williams, p. 1899.

Williams was a criminal case involving a Florida statute which provided for six-man juries, and construed that statute against the jury provision of the Sixth Amendment. It is logical to conclude that if called upon to do so the Supreme Court would take a similar view of the jury trial provision of the Seventh Amendment. It appears highly unlikely that the Court would give a stricter interpretation to the Seventh Amendment provision dealing with civil cases than it now has to the Sixth Amendment provision dealing with criminal trials.

-2-

There is no federal statute or rule requiring juries of twelve in civil cases.[1] Twelve member juries are specifically required in criminal cases by Rule 23 of the Federal Rules of Criminal Procedure.

Absent a controlling statute or rule of general application and in the light of the holding in Williams, the Judges of the United States District Court for the District of Minnesota adopted a Local Rule providing for six-man juries in most civil cases.[2] In the interest of securing the cooperation of the members of the Bar in accepting the Rule graciously and assisting in making its purposes effective, the Rule was made applicable only to those cases where jurisdiction was also obtainable in the state courts. Hence it was limited to Diversity, FELA and Jones Act cases with the

---

1. Rule 48 of the Federal Rules of Civil Procedure authorizes the parties to stipulate to a jury of less than 12. This rule was adopted before the Williams decision and was drafted in the light of the then long established constitutional interpretation, see Thompson v. Utah, supra, that a jury must consist of 12 members. But an inference that Rule 48 now requires a jury of 12

absent a stipulation is, in my view, not a proper post-Williams interpretation of the Rule.

---

2. The Rule reads: "IT IS ORDERED that, effective January 1, 1971, the Local Rules of the United States District Court for the District of Minnesota, which became effective January 1, 1970, shall be amended by the addition of a new rule, 6E, reading as follows:

Rule 6E. In all civil jury cases, jurisdiction for which is based on 28 U.S.C. Sec. 1332, 45 U.S.C. Sec. 51, and 46 U.S.C. Sec. 688, The jury shall consist of six members.

Dated: November 12, 1970.

/s/ EDWARD J. DEVITT
Chief Judge
/s/ EARL R. LARSON
District Judge
/s/ MILES W. LORD
District Judge
/s/ PHILIP NEVILLE
District Judge

thought that if the Rule in its limited form was effective and withstood challenge, if any, it later would be extended to federal jurisdiction cases as well.

The new Rule and the reasons for it were fully explained to the members of the Bar thru articles in legal periodicals and by appearances before Bar Association meetings.

The Bar has fully cooperated in inaugurating the new Rule and trial attorneys have expressed satisfaction with it in practice.

It is suggested that the present three peremptory strikes per side now permitted by the statute, 28 U.S.C. 1870, be reduced to two per side in order to provide a better proportioned relationship between the size of the jury and the permitted number of strikes. The present statute providing for a total of six peremptory strikes was enacted in the light of the then constitutional requirement

of a jury of twelve. The Jury Committee of the Judicial Conference of the United States has this suggested change under consideration and it seems reasonable to expect that such an amendment will be recommended.

The Judges of the Court have been completely satisfied with the new Rule. The practice under it permits an appreciable saving of time for the Court and its supporting personnel in calling, impaneling, interrogating and otherwise managing the jury panel. Obviously it takes less time to poll six jurors than twelve. Six move in and out of the jury box in a shorter time. The same time saving is true in the jurors' examination of exhibits during trial. It is also likely, but difficult to substantiate, that six can come to a unanimous decision more quickly than twelve.

Our experience has given us every reason to believe that the verdicts of smaller juries are just as reasoned and sound, and are based on the same care and consideration of the evidence and faithful subscription to the Court's charge as are the verdicts of the traditional twelve-man jury.[3]

Indeed the United States Supreme Court has expressed confidence in the reliability of verdicts reached by juries of less than twelve. Justice White observed in Williams:

> "... Certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size."

and concluded that there is little reason to think that the proper goals of the jury

> "... are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12 -- particularly if the requirement of unanimity is retained." Williams, p. 1906.

A not insignificant virtue of the change to the six-man jury is the substantial financial saving it effects.

In the five month period since the Rule became effective, the Judges of the Court have tried every case covered by the Rule to

---

3. Such experiments as have been conducted support this conclusion. See Wiehl, The Six Man Jury, 4 Gonzaga L.Rev. 35, 38-39 (1968) at 40-41; Tamm, The Five-Man Civil Jury; A Proposed Constitutional Amendment, 51 Geo.L.J. 120, 128-130 (1962), at 134-136; Cronin, Six-Member Juries in District Courts, 2 Boston B.J. 27 (1958); Six-Member Juries Tried in Massachusetts District Court, 42 J.Am.Jud. Soc. 138 (1958); New Jersey Experiments with Six-Man Jury, 9 Bull. of the Section of Jud. Ad. of the ABA (May 1966); Phillips, A Jury of Six in all Cases, 30 Conn. B.J. 354 (1956).

six-man juries without incident or objection. The twenty-seven civil cases so tried took eighty-nine trial days totalling 524 juror days.[4] The immediately discernible financial savings is substantial. Jurors receive statutory compensation of $20.00 per day and an estimated average of $5.00 per day in mileage and expense reimbursement for a total of $25.00 per day. This figure multiplied by the 524 juror days which were saved by the six-man jury Rule represents a money saving of $13,100.

If the Rule is broadened to cover all civil cases, as we expect to do in the near future, additional savings will be made.

The saving in jury expenses if the six-man jury rule were effected country-wide is impressive. In fiscal year 1970, 3,371 civil jury trials were conducted in the Federal Court System. These cases took 10,701 trial days and, with twelve-person juries, a total of 128,512 juror days. If this figure is cut in half and multiplied by $25.00 the approximate saving effected by employing a six, rather than a twelve-man jury, would exceed $1,600,900!

The trend toward six-man juries in civil cases in the Federal Courts is growing rapidly. In the past five months, 16 or more

districts have adopted a rule providing for juries of less than twelve.[5]

---

4. During the same period the Judges tried 16 criminal cases and two civil antitrust cases, not covered by the Rule, to 12 man juries.

---

5. The Districts, effective date of the Rule, and the type of cases to which it is made applicable are:

District	Effective	Applies
Minnesota	1/1/71	Diversity, FELA, Jones Act
Eastern District of Illinois	2/1/71	Diversity, FELA, Jones Act
District of Columbia–Superior Court	2/1/71	Unless counsel request 12
Southern District of Florida	3/1/71	Diversity, FELA, Jones Act
Central District of California	3/1/71	All

(Continued)

The Judges in at least 19 other districts are in the process of, or are considering making the change.[6] These figures probably underestimate the present number of districts which have adopted the six-man jury since my information is limited to that acquired thru unofficial correspondence with Judges and Clerks.

The movement in the federal courts has encouraged state legislatures to provide for juries of less than twelve in state court civil trials. New Mexico is considering the change and the Minnesota Legislature recently enacted such a law.[7]

---

5. (continued)

Western District of Louisiana	4/15/71	Diversity, FELA, Jones Act
Southern District of Illinois	5/1/71	All
Eastern District of Louisiana	5/1/71	All
Northern District of Indiana	5/1/71	Diversity, FELA, Jones Act, Land Condemnation
Southern District of Indiana	5/1/71	Diversity, FELA, Jones Act, Land Condemnation
New Mexico	5/1/71	All

Wyoming	5/1/71	Diversity, FELA, Jones Act
Kansas	6/1/71	All
District of Columbia–District Court	6/1/71	All
Western District of Texas	7/1/71	Diversity, FELA, Jones Act
Northern District of Illinois	9/13/71	All

---

6. The districts are:

Eastern District of Arkansas	North Dakota
Northern District of Florida	Northern District of Oklahoma
Hawaii	Oregon
Maine	Eastern District of Pennsylvania
Maryland	Western District of Pennsylvania
Eastern District of Michigan	Rhode Island
Western District of Missouri	South Dakota
New Hampshire	Middle District of Tennessee
Eastern District of New York	Northern District of Washington
Northern District of New York	

---

7. House File 2094 enacted by 1971 Minnesota State Legislature, amending Minnesota Statutes 1969, sections 593.01, 546.09 and 546.10.

Three states, Florida, Utah and Virginia, have provisions making a less than twelve-man jury mandatory in civil jury trials in their courts of general jurisdiction. Fla. Stat. Ann. Sec. 54.14 (1943) (Six jurors); Utah Const. Art 1, Sec. 10 (eight jurors); Va. Code Ann. Sec. 8-193 (1950) (seven jurors).

-7-

The Judicial Conference of the United States at its March 1971 meeting endorsed "in principle" the use of six-man juries in civil cases and its committees are studying the best method for effecting the practice systemwide, either thru amendment of the Civil Rules of Procedure, the enactment of specific statutory authority, or both.

The constantly increasing work burden of the Federal Courts requires a reappraisal of our practices and the adoption of new methods and procedures to meet the added responsibility. In the District of Minnesota the number of civil case filings increased 22% and the number of criminal case filing increased 46% between

fiscal years 1969 and 1970. Rowland F. Kirks, Director of the Administrative Office of the United States Courts states in his 1970 Annual Report that nationwide the civil and criminal filings have increased 13% over 1969, and that the backlog in the United States District Courts is now the highest in history.

We have the duty, all of us, to search for new and better methods of judicial administration. Employment of six-man juries in civil cases is one way of increasing the efficiency of the Courts and at considerable financial saving to the Government and without sacrifice of essential legal rights of the litigants.

The experiment in Minnesota has been successful.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Title omitted in printing)

ANSWER OF RESPONDENT

STATE FARM MUTUAL AUTOMOBILE

INSURANCE COMPANY

I.

This respondent accepts petitioner's statement of facts.

II.

ISSUES

There are three issues presented:

A. Can a United States District Court adopt a rule of procedure which denies to civil litigants the right to a jury trial before a jury of twelve, or any number between six and twelve, jurors?

B. Should a United States District Court be permitted to adopt a rule of procedure which, when applied, substantially changes the nature of civil juries?

C. Should a United States District Court be permitted to

adopt a rule of procedure, the validity of which is in substantial doubt, thus imposing on litigants the risk and uncertainty of appellate reversal on a point over which the litigants have no control?

III.

REASONS THAT THE WRIT SHOULD ISSUE

1. Rule 13(d)(1), Revised Rules of Procedure of the United States District Court for the District of Montana, (hereinafter simply Rule 13(d)(1) is in derogation of the Seventh Amendment to the Constitution of the United States.

2. Rule 13(d)(1) violates 28 USC Sections 2071 and 2072 and Rule 83, F.R.Civ.P.

3. Rule 13(d)(1) violates and is inconsistent with 28 USC Section 2072.

4. "Reform" of the jury system by reducing the size of juries, even if permissible and desirable, should be accomplished legislatively and comprehensively; specifically, a six-man jury chosen after the exercise of six peremptory challenges is virtually certain not to be a fair cross-section of the community.

5. Even if this Court should approve Rule 13(d)(1), the issue would be subject to doubt and uncertainty until the Supreme Court of the United States decides it.

Respondent STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY therefore urges that the Court grant the petition for a writ of mandamus and direct the respondent to try Civil No. 783 to a jury of twelve persons.

Respectfully submitted,

JARDINE, STEPHENSON, BLEWETT & WEAVER

By /s/ L. Morris Ormseth

Attorneys for Respondent STATE FARM MUTUAL AUTOMOBILE INSURANCE

COMPANY
700 First National Bank Building
Great Falls, Montana

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROLAND V. COLGROVE,

Petitioner,

-vs- **No. 71-2546**

HON. JAMES F. BATTIN, United States District Judge for the District of Montana, Billings Division,

Respondent.

Original Proceedings
Petition for Writ of Mandamus

Before: MERRILL, DUNIWAY and TRASK, Circuit Judges

MERRILL, Circuit Judge

Pursuant to the authority of Rule 83 of the Federal Rules of Civil Procedure,[1] the District Court for the District of Montana promulgated its local Rule of Procedure 13(d)(1), effective September 1, 1971:

> "A jury for the trial of civil cases shall consist of six persons * * *."

In Civil Case No. 783 in the District Court for the District of Montana, petitioner, as plaintiff, sought a jury trial. Respondent District Judge, over the objection of petitioner that he was entitled to a jury of twelve, ordered that trial be to a jury of six persons, pursuant to the new local rule. Petitioner, by these proceedings seeking a writ of mandamus, challenges the validity of that rule. The defendant in Civil Case No. 783 has appeared in these proceedings, aligning itself with the position of petitioner.

The challenge to the District Court rule is primarily on three levels:

1. It is contended that the rule violates the Seventh Amendment to the Constitution of the United States.[2]

We conclude otherwise.

In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court held that the Sixth Amendment does not guarantee a right to a jury of twelve in criminal cases. While the question of whether this conclusion should apply to civil cases under the Seventh Amendment was reserved by the Court, 399 U.S. at 92 n. 30, the reasons given for the holding seem to us to apply with equal force to the Seventh Amendment. That amendment does, it is true, refer to the common law. It does not, however, purport to define the jury or trial by jury in terms of the common law.

2. It is contended that the local rule cannot stand in light of 28 U.S.C. Sec. 2072, the statute which authorized promulgation by the Supreme Court of the Federal Rules of Civil Procedure.[3]

We conclude otherwise.

Here we are confronted with the phrase "right of trial by jury as at common law." This language upon its face would appear to deny to the Supreme Court authority to dispense with any characteristics of the jury or of trial by jury known to the common law. This would indeed be a sweeping limitation. The Congress has, it is true, dealt extensively with the jury system. 28 U.S.C. Sec. 1861 et seq. It is hardly conceivable, however, that it was felt that the Supreme Court should not be allowed initially to move in interstitial areas save in accordance with perhaps archaic common law procedures.[4]

An historical inquiry suggests that the language in question was included in the predecessor statute, Act of June 19, 1934,

ch. 651, Sec. 2, 48 Stat. 1064, in anticipation that the forthcoming rules would unite law and equity and to assure that with such union the right of trial by jury would be neither expanded nor contracted. 5 Moore's Federal Practice, par. 38.06 at 44 (2d ed. 1971). See also House Rep. No. 1829, 73d Cong., 2d Sess. (1934).

We construe the language in question in accordance with this position. In our view, "as at common law" in this context means "in those cases in which the right existed at common law." The parallel inclusion in Sec. 2072 of the phrase "as declared by the Seventh Amendment" serves to assure that the essence of the right to trial by jury itself will be maintained in appropriate cases governed by the federal rules.[5] Each phrase then serves an important but distinct purpose.

3. It is contended that the rule is inconsistent with Rules 38(a)[6] and 48[7], Federal Rules of Civil Procedure, and thus violates Rule 83, supra, as quoted in note 1.

We conclude otherwise.

As to Rule 38(a), our discussion of the Seventh Amendment applies.

Rule 48 must, we feel, be read in light of the fact that at the time of promulgation a jury of twelve was the only jury known to the federal law and was thought to be constitutionally required.[8] The rule as promulgated thus provided means for obtaining a less cumbersome fact-finding body than was otherwise provided by law by allowing the parties in a civil trial together to waive their individual rights to a jury of a certain size.[9] To read it to provide means for enlarging the jury, i.e., as an affirmative grant of a right to the parties to demand more than the law otherwise requires, is to stand it on its head.

Judge Devitt, Chief Judge of the United States District Court for the District of Minnesota, writing on the subject of the six-man

jury in federal courts, states with reference to Rule 48:

> "This rule was adopted before the Williams decision and was drafted in the light of the then long established constitutional interpretation, see Thompson v. Utah, [170 U.S. 343 (1898)], that a jury must consist of 12 members. But an inference that Rule 48 now requires a jury of 12 absent a stipulation is, in my view, not a proper post-Williams interpretation of the Rule." Devitt, The Six Man Jury in the Federal Court, 53 F.R.D. 273, 274 n. 1 (1971).

Such apparently is also the view of the many district courts which have now adopted rules similar to that of the Montana District Court.[10]

Writ denied.

FOOTNOTES

1. (Page 1) Rule 83 provides in part that:

   "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules."

2. (Page 2) U.S. Const., amend. VII:

   "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

3. (Page 2) This section provides in part:

   "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

4. (Page 2) Cf. Byrne v. Matczak, 254 F.2d 525, 528-29 (9th

Cir.), cert. denied, 358 U.S. 816 (1958), where the court determined (though in response to a constitutional attack) that a district judge had discretion to order dispersal of the jury overnight despite the fact that "the allowance of a dispersal is contrary to the old common law." The court ruled that "fair new procedures, which tend to facilitate proper fact finding, are allowable, although not traditional." 254 F.2d at 529.

5. (Page 3) Cf. Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 10 (1941). (If under the predecessor of Sec. 2072 "the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved.") (emphasis supplied).

6. (Page 3) Rule 38(a):

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

7. (Page 3) Rule 48:

> "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

8. (Page 3) See the discussion in Williams v. Florida, 399 U.S. 78, 90-92 (1970).

We note that Fox v. United States, 417 F.2d 84, 89 (5th Cir. 1969), cited Rule 48 for the proposition that the verdict in federal civil trials must in the absence of stipulation be given by twelve jurors. This decision, however, was rendered prior to Williams v. Florida, discussed in text, and thus quite understandably saw Rule 48 as reflecting the

then-established view that a party who did not choose to stipulate to a lesser number was entitled to trial by a jury of twelve.

9. (Page 3) Cf. 5A Moore's Federal Practice 2152 (2d ed. 1971).

10. (Page 4) See, e.g., Devitt, The Six Man Jury in the Federal Courts, 53 F.R.D. 273, 277 n. 5 (1971).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

IT IS HEREBY ORDERED that the Revised Rules of Procedure of the United States District Court for the District of Montana effective January 1, 1968, be amended in the following respects, effective September 1, 1971:

* * *

Rule 13(d)

(d) Jury Trials.

1. A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled.

* * *

CERTIFICATE OF SERVICE

I, LLOYD J. SKEDD, attorney for the Petitioner herein, hereby certify that on this 21st day of November, 1972, I served the foregoing Single Appendix by depositing full, true and correct copies thereof, in the United States mail, first class postage prepaid, addressed as follows: (Airmail, 3 copies each)

Honorable James F. Battin
U.S. District Judge for Montana
Federal Building
Billings, Montana 59101

Mr. Cale Crowley
Crowley, Kilbourne, Haughey,
Hanson & Gallagher
Attorneys at Law
Electric Building, P.O. Box 2529
Billings, Montana 59101

Mr. Dale F. Galles
Harwood, Galles, Gunderson & Beiswanger
Attorneys at Law
Electric Building
Billings, Montana 59101
(attorneys for respondent)

Mr. L. Morris Ormseth
Jardine, Stephenson, Blewett & Weaver
Attorneys at Law
700 First National Bank Building
Great Falls, Montana 59403
(attorneys for State Farm
Automobile Insurance Company

Solicitor General
Department of Justice
Washington, D. C. 20530

/s/ Lloyd J. Skedd

SUPREME COURT OF THE UNITED STATES

_____ Term, 19 ____

No. _____

71-1442

ROLAND V. COLGROVE,

Petitioner,

against

HONORABLE JAMES F. BATTIN,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF MONTANA,
BILLINGS DIVISION.

Respondent.

• • • • • • • • • • •

ROLAND V. COLGROVE,

Plaintiff,

-vs-

Civil No. 763

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LLOYD J. SKEDD
P. O. Box 1195
Helena, Montana 59601
Counsel for Petitioner

INDEX
TABLE OF CONTENTS

	Page
The Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statute and Regulations Involved	3
Statement of the Case	4
Reasons for Granting Writ	5
Conclusion	6
Appendix	7
Order and Opinion of the Court Below	7
Certificate of Service	12

CASES CITED

Capital Traction Co. v. Hof, 174 U.S. 1, 43 L.Ed. 873, 19 S.Ct. 580	5
Fox v. United States, 417 F.2d 84, 89 (5th Cir. 1969)	6
Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854	5
Williams v. Florida, 399 U.S. 78, 26 L.Ed.(2d) 466, 90 S.Ct. 1893	5

U.S. CONSTITUTION CITED

Sixth Amendment	2,5
Seventh Amendment	3,5,6

INDEX

STATUTES CITED

	Page
28 U.S.C. Section 1254(1)	2
28 U.S.C. Section 1414(b)	4
28 U.S.C. Section 2071	3,6
28 U.S.C. Section 2072	3,6
F.R.Civ.P., Rule 48	2,3,5
F.R.Civ.P., Rule 83	2,3,5
Revised Rules of Procedure of the United States District Court of Montana, Rule 13(d)(1)	4

MISCELLANEOUS

7 Moore's Federal Practice (2d), par. 83.03, pg. 4704	5

SUPREME COURT OF THE UNITED STATES

_____ Term, 19 ____

No. _____

ROLAND V. COLGROVE,

Petitioner,

against

HONORABLE JAMES F. BATTIN,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF MONTANA,
BILLINGS DIVISION,

Respondent.

• • • • • • • • • • •

ROLAND V. COLGROVE,

Plaintiff,

-vs-

Civil No. 783

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on March 6, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet officially reported. The court below refused to grant petitioner a writ of mandamus to force the United States District Court for the District of Montana to try this case before a jury of twelve persons. A copy of said opinion is found in the Appendix.

JURISDICTION

The order and decision of the United States Court of Appeals was entered on March 6, 1972. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) Did the court below err in holding that the Seventh Amendment to the Constitution of the United States does not require that a United States District Court try a civil case before a jury of twelve persons?

(2) Did the court below err in holding that Rule 48 and Rule 83 of the Federal Rules of Civil Procedure do not require the trying of cases before a jury of twelve persons unless the parties stipulate otherwise?

CONSTITUTIONAL PROVISIONS INVOLVED

Admendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, * * *."

Amendment VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

STATUTES AND RULES INVOLVED

28 U.S.C., Section 2071, provides:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

It is stated in 28 U.S.C., Section 2072:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as to common law and as declared by the Seventh Amendment to the Constitution."

Rule 48, Federal Rules of Civil Procedure, provides:

"The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Rule 83, Federal Rules of Civil Procedure, provides:

"Each district court by action of a majority of the

judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. * * * In all cases not provided for by rules, the district courts may regulate their practice in any manner not inconsistent with these rules."

Rule 13(d)(1) of the Revised Rules of Procedure of the United States District Court for the District of Montana provides:

"A jury for the trial of civil cases shall consist[of six persons * * *"

STATEMENT OF THE CASE

The suit in the United States District Court for the District of Montana, out of which the petition for writ of mandamus grew, was an action for libel and jurisdiction of the case is invoked under Title 28, U.S.C. 1414(b). There is diversity of citizenship between the parties hereto and the amount in controversy exceeds $10,000.00.

The United States District Court for the District of Montana passed Rule 13(d)(1) of the Revised Rules of Procedure of said court, and the same became effective on September 1, 1971. Pursuant to said Rule 13(d)(1), the United States District Court set the trial of Civil No. 783 for September 27, 1971, to a jury consisting of six persons.

The plaintiff moved the court to try Civil No. 783 to a trial jury of twelve persons. The court denied this motion, but rescheduled the trial of the case for October 12, 1971. Thereafter, the court vacated that setting and ordered that the resetting be subject to the direction of the Circuit Court of Appeals.

The petitioner, on or about October 7, 1971, petitioned the Circuit Court of Appeals for the Ninth Circuit for a writ of mandamus. Thereafter, and on March 6, 1972, the Circuit Court of Appeals handed down its order and opinion denying the petition for writ of mandamus.

REASONS FOR GRANTING THE WRIT

(1) This Court, in *Williams v. Florida*, 399 U.S. 78, 26 L.Ed. (2d) 466, 90 S.Ct. 1893, while holding that the Seventh Amendment does not guarantee a right to a jury of twelve persons in a criminal case, in Note 30, 399 U.S. 92, said:

> "* * * we do not decide whether, for example, additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation."

The Sixth Amendment does not use the words "common law." The Seventh Amendment uses the words "common law" twice.

At common law, a jury consisted of twelve persons. *Williams v. Florida*, supra; *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854.

This Court has heretofore ruled that the Seventh Amendment guaranteed a right to a jury of twelve persons. *Capital Traction Co. v. Hof*, 174 U.S. 1, 43 L.Ed. 873, 19 S.Ct. 580.

The Court should now grant the writ of certiorari so the parties would not be subject to possible reversal of the case because of not trying the case before a jury of twelve persons.

(2) The U.S. District Court, under Rule 83 of the Federal Rules of Civil Procedure, can make rules not inconsistent with Federal Rules.

The local rules must not be inconsistent with the Federal Rules. 7 Moore's Federal Practice 2d, paragraph 83.03

Rule 48 of the Federal Rules of Civil Procedure gives the parties power to stipulate to a jury of less than twelve persons. It does not give the United States District Court the authority to force upon the parties a jury of less than twelve persons. In *Fox v. United States*, 417 F.(2d) 84,

89 (5th Cir. 1969), the Court held that, in the absence of a stipulation, Rule 48 required a jury of twelve persons.

28 U.S.C. 2071 grants to the Supreme Court and the other courts the power to make rules. 28 U.S.C. 2072 provides for the power of the Supreme Court to make the general rules for all of the courts and to submit them to Congress. It is noteworthy in 28 U.S.C. 2072 that the following words are used:

> "Such rules * * * shall preserve the right of trial by jury as a common law and as declared by the Seventh Amendment to the Constitution."

Congress, at the time of passing this bill, must have known that the accepted rule was that a common law jury consisted of twelve persons.

It appears, therefore, that if a jury of twelve persons is not constitutionally necessary under the Seventh Amendment, that until Congress changes the law the United States District Court cannot force upon the parties a jury of less than twelve persons.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

LLOYD J. SKEDD
P. O. Box 1195
Helena, Montana 59601

s/ Lloyd J. Skedd

Counsel for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROLAND V. COLGROVE,
Petitioner,

vs.

HON. JAMES F. BATTIN,
United States District Judge
for the District of Montana,
Billings Division,
Respondent.

No. 71-2546

Original Proceedings
Petition for Writ of Mandamus

Before: MERRILL, DUNIWAY and TRASK, Circuit Judges

MERRILL, Circuit Judge

Pursuant to the authority of Rule 83 of the Federal Rules of Civil Procedure,[1] the District Court for the District of Montana promulgated its local Rule of Procedure 13(d)(1), effective September 1, 1971:

> "A jury for the trial of civil cases shall consist of six persons * * *"

In Civil Case No. 783 in the District Court for the District of Montana, petitioner, as plaintiff, sought a jury trial. Respondent District Judge, over the objection of petitioner that he was entitled to a jury of twelve, ordered that trial be to a jury of six persons, pursuant to the new local rule. Petitioner, by these proceedings seeking a writ of mandamus, challenges the validity of that rule. The defendant in Civil Case No. 783 has appeared in these proceedings, aligning itself with the position of petitioner.

The challenge to the District Court rule is primarily on

three levels:

1. It is contended that the rule violates the Seventh Amendment to the Constitution of the United States.[2]

We conclude otherwise.

In *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court held that the Sixth Amendment does not guarantee a right to a jury of twelve in criminal cases. While the question of whether this conclusion should apply to civil cases under the Seventh Amendment was reserved by the Court, 399 U.S. at 92 n.30, the reasons given for the holding seem to us to apply with equal force to the Seventh Amendment. That amendment does, it is true, refer to the common law. It does not, however, purport to define the jury or trial by jury in terms of the common law.

2. It is contended that the local rule cannot stand in light of 28 U.S.C. Sec. 2072, the statute which authorized promulgation by the Supreme Court of the Federal Rules of Civil Procedure.[3]

We conclude otherwise.

Here we are confronted with the phrase "right of trial by jury as at common law." This language upon its face would appear to deny to the Supreme Court authority to dispense with any characteristics of the jury or of trial by jury known to the common law. This would indeed be a sweeping limitation. The Congress has, it is true, dealt extensively with the jury system. 28 U.S.C. Sec. 1861, et seq. It is hardly conceivable, however, that it was felt that the Supreme Court should not be allowed initially to move in interstitial areas save in accordance with perhaps archaic common law procedures.[4]

An historical inquiry suggests that the language in question was included in the predecessor statute, Act of June 19, 1934, ch. 651, Sec. 2, 48 Stat. 1064, in anticipation that the forthcoming rules would unite law and equity and to assure

that with such union the right of trial by jury would be neither expanded nor contracted. 5 *Moore's Federal Practice*, par. 938.06 at 44 (2d ed. 1971). *See also* House Rep. No. 1829, 73d Cong., 2d Sess. (1934).

We construe the language in question in accordance with this position. In our view, "as at common law" in this context means "*in those cases in which the right existed* at common law." The parallel inclusion in Sec. 2072 of the phrase "as declared by the Seventh Amendment" serves to assure that the essence of the right to trial by jury itself will be maintained in appropriate cases governed by the federal rules.[5] Each phrase then serves an important but distinct purpose.

3. It is contended that the rule is inconsistent with Rules 38(a)[6] and 48[7], Federal Rules of Civil Procedure, and thus violates Rule 83, *supra*, as quoted in note 1.

We conclude otherwise.

As to Rule 38(a), our discussion of the Seventh Amendment applies.

Rule 48 must, we feel, be read in light of the fact that at the time of promulgation a jury of twelve was the only jury known to the federal law and was thought to be constitutionally required.[8] The rule as promulgated thus provided means for obtaining a less cumbersome fact-finding body than was otherwise provided by law by allowing the parties in a civil trial, together to waive their individual rights to a jury of a certain size.[9] To read it to provide means for enlarging the jury, i.e., as an affirmative grant of a *right* to the parties to demand more than the law otherwise requires, is to stand it on its head.

Judge Devitt, Chief Judge of the United States District Court for the District of Minnesota, writing on the subject of the six-man jury in federal courts, states with reference to Rule 48:

"This rule was adopted before the *Williams*

> decision and was drafted in the light of the then long established constitutional interpretation, see Thompson v. Utah, [170 U.S. 343 (1898)], that a jury must consist of 12 members. But an inference that Rule 48 now requires a jury of 12 absent a stipulation is, in my view, not a proper post-*Williams* interpretation of the Rule." Devitt, *The* Six Man Jury in the Federal Court, 53 F.R.D. 273, 274 n. 1 (1971).

Such apparently is also the view of the many district courts which have now adopted rules similar to that of the Montana District Court.[10]

Writ denied.

FOOTNOTES

1. (Page 1) Rule 83 provides in part that:
   "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules."
2. (Page 2) U.S. Const., amend. VII:
   "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."
3. (Page 2) This section provides in part:
   "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as to common law and as declared by the Seventh Amendment to the Constitution."
4. (Page 2) *Cf. Byrne v. Matczak*, 254 F.2d 525, 528-29 (9th Cir.), *cert. denied*,358 U.S. 816 (1958), where the

court determined (though in response to a constitutional attack) that a district judge had discretion to order dispersal of the jury overnight despite the fact that "the allowance of a dispersal is contrary to the old common law." The court ruled that "fair new procedures, which tend to facilitate proper fact finding, are allowable, although not traditional." 254 F.(2d) 529.

5. (Page 3) *Cf. Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 10 1941). (If under the predecessor of Sec. 2072 "the rules are to prescribe a single form of action for cases at law and suits in equity, the *constitutional right to jury trial inherent in the former* must be preserved.") (emphasis supplied).
6. (Page 3) Rule 38(a):

   "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."
7. (Page 3) Rule 48:

   "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."
8. (Page 3) See the discussion in *Williams v. Florida*, 399 U.S. 78, 90-92 (1970).

   We note that *Fox v. United States*, 417 F.2d 84, 89 (5th Cir. 1969), cited Rule 48 for the proposition that the verdict in federal civil trials must in the absence of stipulation be given by twelve jurors. This decision, however, was rendered prior to *Williams v. Florida*, discussed in text, and thus quite understandably saw Rule 48 as reflecting the then-established view that a party who did not choose to stipulate to a lesser number was entitled to trial by a jury of twelve.
9. (Page 3) Cf 5a *Moore's Federal Practice* 2152 (2d ed. 1971).
10. (Page 4) See, e.g., Devitt, *The Six Man Jury in the Federal Courts*, 53 F.R.D. 273, 277 n.5 (1971).

CERTIFICATE OF SERVICE

I, LLOYD J. SKEDD, attorney for the Petitioner herein, hereby certify that on this 2nd day of May, 1972, I served the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, by depositing full, true and correct copies thereof, in the United States mail, first class postage prepaid, addressed as follows:

Honorable James F. Battin
U.S. District Judge for Montana
Federal Building
Billings, Montana (1 copy)

Mr. Cale Crowley
Crowley, Kilbourne, Haughey,
Hanson & Gallagher
Attorneys at Law
Electric Building, P.O. Box 2529
Billings, Montana 59101 (1 copy)

Mr. Dale F. Galles
Harwood, Galles, Gunderson & Beiswanger
Attorneys at Law
Electric Building
Billings, Montana 59101 (1 copy)
(attorneys for respondent)

Mr. L. Morris Ormseth
Jardine, Stephenson, Blewett
& Weaver
Attorneys at Law
700 First National Bank Building
Great Falls, Montana 59403 (3 copies)
(attorneys for State Farm
Automobile Insurance
Company)

Solicitor General
Department of Justice
Washington, D. C. 20530 (3 copies)

s/ Lloyd J. Skedd

In the Supreme Court

of the

United States

October Term 1972

No. 71-1442

ROLAND V. COLGROVE, *Petitioner,*

against

HONORABLE JAMES F. BATTIN,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF MONTANA,
BILLINGS, DIVISION, *Respondent.*

ROLAND V. COLGROVE, *Plaintiff,*

vs. Civil No. 783

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, *Defendant.*

Brief of Respondent Requesting an Order Affirming Forthwith on the Merits the Opinion of the Ninth Circuit Court of Appeals or, in the Alternative, Denying the Petition for Writ of Certiorari.

CALE CROWLEY
P. O. Box 2529
Billings, Montana 59103

Of Counsel for Respondent:
Dale F. Galles
Harwood, Galles, Gunderson
& Beiswanger
400 Electric Building
Billings, Montana 59101

INDEX

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
LANGUAGE OF OUR UNITED STATES CONSTITUTION AND ITS HISTORICAL BACKGROUND	3
SIGNIFICANT CASES WHICH HAVE CONSTRUED THE SEVENTH AMENDMENT	8
PLACING WILLIAMS-STATE OF FLORIDA IN ITS PROPER PERSPECTIVE	12
CONCLUSION	15

UNITED STATES SUPREME COURT CASES

Baltimore and Carolina Line, Inc. vs. Redman, 1935, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 11

Bloom v. State of Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 14

Duncan v. State of Louisiana, May 20, 1968, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491; reh. den. 392 U.S. 947, 88A S.Ct. 2270, 20 L.Ed.2d 1412 13

Ex Parte Peterson, 253 U.S. 300, 40 S.Ct. 543 64 L.Ed. 919 8

Galloway v. United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 9

Hanna v. Plumber, Mass., 1965, 380 U.S. 460 at 472, 85 S.Ct. 1136 at 1144, 14 L.Ed2d 8 10

Ross v. Bernhard, 1970, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed2d 729 11

Williams v. State of Florida, June 22, 1970, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 ....3, 12, 15

CIRCUIT COURT CASES

Page

Byrne v. Matczak, 3rd C.C., 1958, 254 F2d 525, cert. den. 358 U.S. 816, 79 S.Ct. 24, 3 L.Ed.2d 58 9

Cooley v. Strickland Transport Co., 5th C.C. 11

MONTANA DISTRICT COURT RULES

Rule 13(d)(1) 2, 3

SUPREME COURT RULES

Rule 40 17

FEDERAL RULES OF CIVIL PROCEDURE

38(a) F.R.C.P. 16

83 F.R.C.P. 16

UNITED STATES CONSTITUTION

Article I (Clause 9, 18) 5, 6

Article III, Par. 1 5

Sixth Amendment 7

Seventh Amendment 8

In the Supreme Court

of the

United States

October Term 1972

No. 71-1442

ROLAND V. COLGROVE, *Petitioner,*

against

HONORABLE JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA, BILLINGS, DIVISION, *Respondent.*

ROLAND V. COLGROVE, *Plaintiff,*

vs. Civil No. 783

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Defendant.*

Brief of Respondent Requesting an Order Affirming Forthwith on the Merits the Opinion of the Ninth Circuit Court of Appeals or, in the Alternative, Denying the Petition for Writ of Certiorari.

QUESTION PRESENTED

Effective *September 1, 1971,* the District Court of the United States for the District of Montana promulgated its district court *Rule 13(d)(1)* prescribing a jury of six persons for the trial of civil cases. Petitioner requested a mandate from the Ninth Circuit Court declaring *Rule 13(d)(1)* void and invalid, and ordering the District Court to try his civil, damage action before a jury of twelve persons. The Ninth Circuit Court in a written opinion, denied the application, and petitioner has now applied to this court for a writ of Certiorari.

Respondent requests this court to summarily affirm on the merits the opinion of the Ninth Circuit Court on the briefs and without the necessity of oral argument. As an alternative, we request that the petition for writ of certiorari be denied.

STATEMENT OF POSITION

There is no constitutional language, no congressional enactment, no rule of Federal Civil Procedure, and no rule of the Supreme Court of the United States, requiring that a jury for a civil, legal action shall consist of twelve persons, nor preventing nor precluding a district court from promulgating a rule of procedure requiring a jury of six persons. Petitioner has failed to place the constitutional language involved in its proper perspective in light of the historical background in which the first seven articles of the Constitution were promulgated at the first Constitutional Convention, and

in light of the historical background in which Amendments 6 and 7 were promulgated by the first Congress.

Furthermore, petitioner has failed to give proper or adequate consideration to the language of those decisions of the Supreme Court of the United States which have construed the scope of the Seventh Amendment in other areas.

Finally, when *Williams v. State of Florida, June 22, 1970, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* is placed in its proper perspective with the constitutional language, its historical background, and other decisions of this United States Supreme Court, it is manifestly clear that the Montana United States District Court *Rule 13(d)(1)* is a valid and subsisting rule of procedure, and that the Ninth Circuit Court should be affirmed.

LANGUAGE OF OUR UNITED STATES CONSTITUTION AND ITS HISTORICAL BACKGROUND

We do not have available locally the debates of the original constitutional convention. We do have, however, the writings of numerous historians and, in particular, the Federalist Papers published by Alexander Hamilton. All historians agree that one of the burning desires of all delegates was the protection of the personal liberty of all citizens by requiring a jury trial in all criminal cases. Hamilton's Federalist Paper 83, published *May 28, 1788,* confirms the other his-

torians that we have read, that the provision for trial by jury in criminal cases was considered a burning necessity, and that it was also considered desirable to have trial by jury in civil cases as an excellent method of determining questions of property under proper regulation (Lodge's Federalist, page 521). The great difference in jury practice among the several states made promulgation of a proviso that was satisfactory to all concerned an extremely difficult matter. We understand that there was a proposal made by Pennsylvania that "trial by jury shall be as heretofore"; and a proposal by Massachusetts for trial by jury in actions at common law "if the parties requested it"; and that both were defeated. We also understand that when the Committee on Style submitted its final draft to the convention on *September 12, 1787,* two modifications were then proposed, one of which was a specific provision for jury trials in civil cases. It was neither accepted nor rejected, but was returned to the Committee on Style to provide such a clause for consideration. We likewise understand from the historians that the failure to include any proviso thereafter in the original seven articles of the Constitution was not because of any disagreement concerning its advisibility, but because (1) the delegates were then ready to go home; (2) the difficulities in drafting a general rule that would satisfy all states because of the variety of court practices in the different states; (3) there was some fear among convention leaders

that prolonged and protracted dispute and debate over the issue might very well devastate the agreement that had already been arrived at; (4) the delegates had fulfilled the burning necessity for proserving the right of jury trial in all criminal cases; and (5) last, but not least, the responsible delegates felt that there was no danger in leaving the drafting and determination with respect to civil cases for Congress to promulgate in the future under the powers vested in Congress in *Section 8, Article 1,* along with the judicial powers vested in such inferior courts as might be created by Congress from time to time as provided in *Article III. Article I(8)* provides that Congress shall have power:

> "To constitute tribunals inferior to the Supreme Court. *(Clause 9)*

Article III, paragraph 1, vests judicial power in the one Supreme Court of the United States:

> "and such inferior courts as the Congress may from time to time ordain and establish."

Article III likewise expressly provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; * * *".

We find additionally significant to our problem the necessary and proper clause of *Section 8, Article I,* which vests power in Congress:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution and the government of the United States, or in any department or officer thereof." *(Clause 18)*

None of the foregoing language of the original seven articles of the original Constitution has ever been altered, changed, nor disturbed in any manner.

Paper 83 of the Federalist by Alexander Hamilton was published *May 28, 1788, b*etween adjournment of the original convention and the convening of the first Congress. He pointed out that the most severe criticism of the first seven articles of the original Constitution that he heard in New York, and perhaps in all the other states, was "relative to the want of the constitutional provision for the trial by jury in civil cases." Many persons feared that by the failure of the Constitution to include such a provision, it was abolished. Hamilton tried to allay such fears in *Paper 83.*

> "A power to constitute courts is a power to prescribe the mode of trail; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. * * *" *(Pp. 518, Lodge, Pp. 357, Beard)*

We add in addition to the power granted to constitute the courts, the supplementary power vested in Congress by the "Necessary and Proper" *Clause 18 of Section 8 of Article I,* coupled with the express vesting of judicial power by *Article III* in all cases in law or equity in such inferior courts as the *Congress* may from time to time ordain and establish. Hamilton also stated:

> "The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually

happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails. * * * It is conceded by all reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature." *(Lodge, Pp. 531-532)*

It seems historically clear that the delegates desired to preserve the right of trial by jury in both civil and criminal cases, but a plan that would define the precise consistency of juries that would satisfy all delegates, and all states, could not be drawn up. For that reason, the Constitution required that the right of trial by jury be preserved, but the plan for the consistency of juries was left to the Congress to legislate from time to time as needs might require.

The omission of any language in Amendments 6 and 7 adopted by the first Congress in *1789* which would spell out or prescribe the number of jurors carries great significance when viewed in the light of that historical background.

"AMENDMENT 6

In all criminal prosecutions the accused shall enjoy the right to a speedy annd public trial, by an impartial jury of the state and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 7

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

SIGNIFICANT CASES WHICH HAVE CONSTRUED THE SEVENTH AMENDMENT

The language of Supreme Court decisions which have construed the scope of the *Seventh Amendment* in other areas is significant.

In an opinion by *Justice Brandeis* in *Ex Parte Peterson, 253 U.S. 300 40 S.Ct. 543, 64 L.Ed. 919,* it was said with respect to the *Seventh Amendment:*

> "The command of the Seventh Amendment that 'the right of trial by jury shall be preserved; does not require that old forms of practice and procedure be retained (citing cases * * *). New devices may be used to adapt the ancient institution (jury trial) to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that ultimate determination of issues of fact by the jury be not interfered with." *(309-310, U.S.; 546, S.Ct.; 923-924, L.Ed.)*

In *Galloway v. United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458,* the Ninth Circuit Court had affirmed the granting of a motion for directed verdict. With respect to such procedure under the *Seventh Amendment* the Supreme Court said in part:

> "The (Seventh) Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial, according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were 'the rules of the common law' then prevalent, including the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common law rules on procedural matters among the states, and between them and England. * * *" *(390-392, U.S.; 1087-1088, S.Ct.; 1471, L.Ed.)*

In *Byrne v. Matczak, 3rd C.C., 1958, 254 F2d 525, cert. den., 358 U.S. 816, 79 S.Ct. 24, 3 L.Ed.2d 58,* a District Judge permitted a trial jury to disperse during deliberations, go to their homes, and return to their deliberations after a night of rest. It was argued that traditionally at common law the trial jury had to be held together intact while deliberating, and the failure to do so violated the right of trial by jury as guaranteed by the *Seventh Amendment.* In rejecting such contention, the court said:

> "True, the allowance of a dispersal is contrary to the old common law. And there is, in Dimick v.

Schiedt, 1935, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603, strong language to the effect that the Seventh Amendment perpetuated jury procedures as they existed in 1791. However prior to Dimick v. Schiedt, the entire development of this area was to the effect that the constitutional conception of jury trial is not inflexible in all details, so long as the essential elements of the institution are preserved. E.g., Gasoline Products Co. v. Champlin Refining Co., 1931, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188; Ex parte Peterson, 1920 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919, and see generally Scott, Trial by Jury and the Reform of Civil Procedure, 1918, 31 Harv.L.Rev. 669. And since Dimick v. Schiedt, supra, this older line of reasoning has been reaffirmed in Galloway v. United States, 1943, 319 U.S. 372, 388-386, 63 S.Ct. 1077, 87 L.Ed. 1458. In this view, fair new procedures which tend to facilitate proper fact finding are allowable although not traditional." *(528-529)*

In *Hànna v. Plumber, Massachusetts, 1965, 380 U.S. 460 at 472, 85 S.Ct. 1136 at 1144, 14 L.Ed. 2d 8,* the court said while construing the validity of service of process under federal rule which apparently was fatally defective under state court provisions:

> "For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing practice and pleading in those courts, which in turn includes power to regulate matters which, though falling within uncertain area between substance and procedure, are rationally capable of classification as either."

The phrase "common law" as first used in the *Seventh Amendment* was held to simply preserve the right to a trial by jury in actions involving legal rights

as distinct from equitable rights *(Ross v. Bernhard, 1970,, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729).*

The second usage in the amendment of the phrase "common law" simply assured that no judge or judges shall substitute their decisions on fact issues in the place and stead of the fact findings of a jury *(Baltimore and Carolina Line Inc. v. Redman, 1935, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636).*

Law Week's Summary & Analysis of Current Law, May 2, 1972, states:

> "Six-Member Civil Jury
> Upheld By Fifth Circuit
>
> Neither the Seventh Amendment nor Fed.R. Civ.P. 48, the U.S. Court of Appeals for the Fifth Circuit rules, prevents a federal district court from limiting civil juries to six members (Cooley v. Strickland Transportation Co., 4/21/72)
>
> The court of appeals finds that Williams v. Florida 399 U.S. 78, 38 LW 4557 (1970), answers the constitutional arguments leveled against the six-member civil jury. In Williams, the Supreme Court held that an individual's Sixth Amendment right, as applied to the states through the Fourteenth, were not violated by Florida's decision to provide a jury of six. No one, the court observes, contends that the function of a civil jury is more important than that of a criminal jury. Since changes in the traditional jury do not offend the concept of 'trial by jury' within the context of a criminal case, the same changes will not offend that concept within the context of a civil case.
>
> Nor does Rule 48 demand a contrary result. The rule provides that 'the parties may stipulate that the jury shall consist of any number less than 12 but that a verdict or finding of a stated majority

> of the jurors shall be taken as the verdict or finding of the jury'. Although it is argued that absent a stipulation to reduce the size of the jury, the rule guarantees a 12-member jury, the court finds that the argument is misplaced. The drafters of the rules knew how to use express language to guarantee a 12-member jury, as evidence by Fed.R.Crim.P. 23(b). Furthermore, the court notes, Rule 48 deals only with a stipulation by 'the parties'. It does not purport to prevent court rules that provide for civil juries of reduced size. (Page 2718)"

We do not yet have the Federal Reporter citation.

When the language of the *Seventh Amendment* is considered in light of the historical background, in light of the language of the foregoing decisions of the Supreme Court construing the scope of the amendment in other areas, in light of the two opinions of the Fifth and Ninth Circuit Courts of Appeal, and in light of the decision in *Williams v. State of Florida* when considered in its proper perspective, the conclusions drawn by petitioner are simply not warranted.

PLACING WILLIAM-STATE OF FLORIDA IN ITS PROPER PERSPECTIVE

Prior to the decision of the Supreme Court of the United States in *Williams vs. State of Florida, June 22, 1970, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* no case presented the precise, specific issue of whether or not the scope of the right of trial by jury guaranteed in criminal cases by the *Sixth Amendment,* or in civil cases by the *Seventh Amendment,* required the number of jurors to be fixed precisely at twelve. We find the *Wil-*

liams case to be of particular significance since it did involve the right of trial by jury in a criminal case. Certainly, if the language of the Constitution cannot be construed as requiring any particular number of jurors in a criminal case, it is difficult to see how it can be so construed to prescribe the number of jurors in a civil case.

We also feel that case decisions handed down shortly before *Williams-State of Florida* assist in placing that case in its proper perspective.

In *Duncan v. State of Louisiana, May 20, 1968, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491; reh. den. 392 U.S. 947, 88A S.Ct. 2270, 20 L.Ed.2d 1412,* a dissenting opinion by *Justice Harlan,* joined by *Justice Stewart,* stated in part:

> "• • • If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty.
>
> Examples abound. I should suppose it obviously fundamental to fairness that a 'jury' means an 'impartial *jury'. I should think it equally obvious that the rule, imposed long ago in the federal courts, that 'jury' means 'jury of exactly twelve', is not fundamental to anything: there is no significance except

to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts, although unanimity has not been found essential to liberty in Britain, where the requirement has been abandoned." *(181, U.S.; 514, L.Ed.; 1465, S.Ct.)*

The foregoing language of *Justice Harlan* was partially utilized by the majority in *Williams-State of Florida:*

"We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to ef- the purposes of the jury system and wholly without significance 'except to mystics'. Duncan v. Louisiana, supra, at 182, 20 L Ed 2d at 514 (Harlan, J., dissenting)." *(102, U.S.; 461, L.Ed.2d; 1907, S.Ct.)*

On *May 20, 1968,* when *Duncan-State of Louisiana* was handed down, the court likewise rendered its decision in *Bloom v. State of Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed. 2d 522,* in which the Supreme Court of the United States held that under the *Sixth Amendment* states are compelled to afford the right of a trial by jury in any prosecution for serious criminal contempt. In a concurring opinion, *Justice Fortas* stated:

"But although I agree with the decision of the Court, I cannot agree with the implication, see ante, 20 L Ed 2d at 501, n.30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offense, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States.

We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law —and that they are not obligatory on the States." *(213, U.S.; 535, L.Ed.2d; 1451, S.Ct.)*

We shall not belabor *William v. State of Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446*, which held:

"* * * The question in this case then is whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six. We hold that the 12 man panel is not a necessary ingredient of 'trial by jury', and that respondent's refusal to impanel more than six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the states through the Fourteenth." *(86, U.S.; 452, L.Ed.2d; 1898, S.Ct.)*

When *Williams-State of Florida*, considered in perspective, upheld the constitutional validity of a jury of six persons in a criminal case, then the validity of a district court rule requiring six jurors in civil cases should be even more clear.

CONCLUSION

Historically, the framers of our Constitution were vitally concerned with protecting and preserving personal liberty through a requirement of a trial by a fair and impartial jury. It was likewise considered desirable in civil cases. Because of the great differences between court practices in the various states, the designing of a detailed plan that would satisfy all was extremely difficult. The intention to preserve the ancient distinc-

tions in civil cases between law and equity is clear. Otherwise, the right of trial by jury was preserved in both criminal and civil actions through general language substantially identical for both classes. The Constitution has never prescribed nor required the number of jurors in any case. Instead, the Constitution empowered Congress to create the inferior courts, and to regulate their conduct through the Necessary and Proper Clause, and thereby to make any changes from time to time as changing conditions might require. The Supreme Court by criminal procedural rules requires a twelve-man jury in criminal cases, but there is no rule promulgated by the Supreme Court which spells out or requires a twelve-man jury in civil cases. All that is required by *38(a) F.R.C.P.* is the right to a trial by jury in civil cases "as declared by the Seventh Amendment", and nothing more. District courts have, of course, been vested with rule-making power where such does not contradict or conflict with statutes or other Supreme Court rule *(83 F.R.C.P.)*. The rule promulgated by the United States District Court for the District of Montana prescribing the number of jurors for the trial of civil cases was authorized under *Rule 83*, and is a valid and subsisting rule.

We respectfully submit in view of the importance and simplicity of the only question presented that the opinion of the Ninth Circuit Court be affirmed forth-

with, and without the necessity of oral argument. In the interest of the earliest possible decision on the merits, we request that this brief of respondent be accepted under *Rule 40* as a brief on the merits. At an alternative, we request that the petition for writ of certiorari be denied.

CALE CROP
P. O. Box 2
Billings, Montana 59103
Attorney for Respondent

SEP 25 1972

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
OCT 10 1972
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1972

No. 71-1442

ROLAND V. COLGROVE,

Petitioner,

against

HONORABLE JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION,

Respondent.

Civil No. 783

ROLAND V. COLGROVE,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

MOTION OF INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

WILLIAM A. WICK,
1000 Merchants Bank Building,
Indianapolis, Indiana 46204.

Of Counsel for International
Association of Insurance Counsel:

ALSTON JENNINGS,
2200 Worthen Bank Building,
Little Rock, Arkansas 72201,

JOHN C. ELAM,
52 East Gay Street,
Columbus, Ohio 43215.

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 71-1442.

ROLAND V. COLGROVE,

Petitioner,

against

HONORABLE JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION,

Respondent.

Civil No. 783.

ROLAND V. COLGROVE,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

MOTION OF INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

International Association of Insurance Counsel respectfully moves the Court, pursuant to Rule 42(3) of the rules of this Court, for an order, granting this Applicant leave to file a brief as *amicus curiae* in the above-entitled proceeding, if and when this Court grants *certiorari* and assumes jurisdiction on the merits.

In support of its motion, Applicant states the following:

1. As an association, composed of more than two-thousand independent defense counsel and house counsel,

representing insurance companies throughout the United States and Canada, Applicant has an interest in this case, because—

(a) Apart from Constitutional questions, Applicant is vitally interested in preserving the essence of our jury trial system on the one hand, while maintaining, on the other hand, sufficient flexibility in the system to permit its adaptation to the needs of changing times: notably, the current need for economy of time and expense in jury trials;

(b) Applicant believes that the rule-making power of United States District Courts is and should be so limited as to preclude, not only rules which conflict with the Federal Rules of Civil Procedure, but also rules which represent "basic procedural innovations";

(c) Applicant believes that basic trial and appellate procedures should apply uniformly throughout the federal court system and that "basic procedural innovations," such as rules which cut in half the traditional twelve-member common law jury, should not be adopted without the kind of widespread and exhaustive consideration which attends the amendment of the Federal Rules of Civil Procedure.

2. Applicant is concerned that this case might be disposed of or decided without careful consideration of the following important questions of law, relating to the scope of the rule-making power of United States District Courts:

(a) Whether or not "basic procedural innovations" like the instant six-member jury rule are beyond the rule-making power of United States District Courts, as held in *Miner* v. *Atlass*, 363 U. S. 641;

(b) Whether or not the instant six-member jury rule is inconsistent with Rule 48 of the Federal Rules of Civil Procedure in either or both of the following respects:

(i) in that Rule 48 was intended to provide a stipulation of the parties as the exclusive means of reducing the size of civil juries;

(ii) in that Rule 48 authorizes the parties to stipulate to a jury either larger or smaller than six members, whereas the District Court's jury rule freezes the jury at six members irrespective of any contrary stipulation of the parties;

(c) Whether or not a federal District Court may lawfully adopt local rules, anticipating changes of Constitutional interpretation which the Supreme Court has not yet announced.

3. None of the above questions of law has been presented by the parties in their Petition or briefs, except issue (b)(i), and applicant believes that issue (b)(i) will bear further analysis.

4. The Petitioner and the Defendant, State Farm Mutual Life Insurance Company, by their respective counsel, have consented to the filing of a brief by this Applicant. Respondent has declined to consent to the proposed brief *amicus curiae*, but Respondent's counsel has indicated that Respondent may not object to Applicant's Motion to file such brief.

Respectfully submitted,

ALSTON JENNINGS,
2200 Worthen Bank Building,
Little Rock, Arkansas 72201,
President of I. A. I. C.,

JOHN C. ELAM,
52 East Gay Street,
Columbus, Ohio 43215,
Chairman of Federal Rules Committee of I. A. I. C.,

/s/ WILLIAM A. WICK,
WILLIAM A. WICK,
1000 Merchants Bank Building,
Indianapolis, Indiana 46204,
Attorneys for Applicant.

CERTIFICATE OF SERVICE.

This is to certify that on September —, 1972, three (3) printed copies of this Motion for Leave to File a Brief *Amicus Curiae* were served upon each of the parties to the above-entitled action by depositing the same in the United States mail, with air mail postage prepaid, addressed to the parties' respective counsel of record, as follows:

LLOYD J. SKEED,
P. O. Box 1195,
1225—11th Avenue,
Helena, Montana 59601,
Counsel for Petitioner.

CALE CROWLEY,
500 Electric Building,
Billings, Montana 59101,
Counsel for Respondent.

L. MORRIS ORMSETH,
Seventh Floor,
First National Bank Building,
Great Falls, Montana 59403,
Counsel for Defendant.

Attorney for International Association of Insurance Counsel.

TABLE OF CONTENTS.

PAGE

Table of Authorities ..... ii-v

Summary of Argument 1

Argument 3

I. The Civil Jury System Should Be Preserved in All Basic Essentials and Any Significant Changes in It Should Be Made Only by Legislation or Amendment of the Federal Rules of Civil Procedure 3

II. The Instant Six Member Jury Rule Is a "Basic Procedural Innovation," Beyond the Rule-Making Power of a Federal District Court Under the Doctrine of Miner v. Atlass 5

A. Major Procedural Changes Should Be Reviewed by the Judicial Conference and Reported to Congress, as in the Case of Amendments to the Federal Rules 5

B. Comments of the Draftsmen of the Federal Rules of Civil Procedure Show That the Purpose of Rule 83 Was to Enable District Courts to Make Limited Local Rules in Interstitial Areas 10

III. To Cut in Half the Traditional Size of Juries Is a "Basic Procedural Innovation" of No Small Consequence 13

IV. The Theory That District Courts Are Free to Fix by Local Rule the Size of Civil Juries Conflicts with the Policy of the Jury Selection Statutes 17

V. The Instant Six Member Jury Rule Is Inconsistent with Rule 48 of the Federal Rules of Civil Procedure, Permitting Reductions in the Size of Juries by Stipulation Only 19

VI. Conclusion 23

Table of Authorities.

Cases.

Allen Forwarding Co. v. United States, 340 Fed. Supp. 412 (1972) 9

Bourne v. A. T. & S. F. Ry. Co., Supreme Ct. Kans. No. 46,627 (1972) 22

Capital Traction Company v. Hof, 174 U. S. 1, 19 S. Ct., 580, 43 L. Ed. 873 (1899) 24

Colgrove v. Battin, 456 F. 2d 1379 (9th Cir., 1972) 20, 21, 22, 23

Cooley v. Strickland Transportation Company, 459 F. 2d 779 (5th Cir., 1972) 20, 21, 22, 23, 24

Farmer v. Arabian American Oil Company, 285 F. 2d 720 (2d Cir., 1960) 8

Federal Maritime Commission v. Anglo-Canadian Shipping Co., 335 F. 2d 255 (9th Cir., 1964) 9

First National City Bank of New York v. Aristeguieta, 287 F. 2d 219 (2d Cir., 1960) 9

Fitzgerald, Public Administrator v. United States Lines Co., 374 U. S. 16, 83 S. Ct. 1646, 10 L. Ed. 2d 725 (1963) 8

Fox v. United States, 417 F. 2d 84 (5th Cir., 1969) 22

Gamble v. Pope & Talbot, Inc., 307 F. 2d 729 (3d Cir., 1962) 9

Goldlawr, Inc. v. Heiman, 369 U. S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962) 7

Harris v. Nelson, 394 U. S. 286, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969) 8

Levy v. Lawnmaster, Inc. (7th Cir. No. 72-1171, 1972) .. 20

Louisville Builders Supply Company v. Commissioner, 294 F. 2d 333 (6th Cir., 1961) 9

Miner v. Atlass, 363 U. S. 641, 80 S. Ct. 1300, 4 L. Ed. 2d 1462 (1960) 2, 5, 6, 7, 8, 9, 10, 13, 19

Mississippi Publishing Corp v. Murphree, 326 U. S. 438 (1946) 10, 16

Sea Trade Corporation v. Bethlehem Steel Company, Shipbuilding Division, 192 Fed. Supp. 913 (S. Dist. N. Y., 1961) 10

Socony Mobil Oil Company, Inc. v. The S. S. Pacific Tide, 189 Fed. Supp. 724 (S. Dist. N. Y., 1960) 10

Weather-Rite Sportswear Co. v. U. S., 298 Fed. Supp. 508 (1969) 9

Williams v. Florida, 399 U. S. 78 (1970) 4, 13, 14, 22, 23, 24

Winsby v. John Oster Manufacturing Company, 336 Fed. Supp. 663 (W. D. Pa., 1972) 18, 20, 24

Wirtz v. Hooper-Holmes Bureau, Inc., 327 F. 2d 939 (5th Cir., 1964) 10

Statutes.

U. S. Const. Amend. VII 23, 24

80 Stat. 323 5

28 U. S. C. § 331 ..... 4, 7

28 U. S. C. § 1861 ..... 4, 14, 17

28 U. S. C. § 1863 17

28 U. S. C. § 1870 ..... 19, 21

28 U. S. C. § 2071 ..... 6, 17

28 U. S. C. § 2072 4

28 U. S. C. § 2073 7

H. R. 7800 (W. L. Scott, 92d Cong.) 5

H. R. 13,496 (E. Celler, 92d Cong.) 5

Rules.

General Admiralty Rule 44 ..... 6, 7, 8
Rule 16, F. R. Civ. Pro. 10
Rule 26, F. R. Civ. Pro. 6
Rule 48, F. R. Civ. Pro. 19, 20, 21, 22, 23
Rule 83 F. R. Civ. Pro. 6, 8, 10, 11, 12, 16, 17, 20
Rule 13(d)(1), Dist. Mont. 20, 21
Rule 29½, E. Dist. Pa. 21
Rule 13, W. Dist. Louisiana 19, 20, 21

Other Authorities.

A. B. A., Federal Rules of Civil Procedure, Proceedings of the Institute at Washington and of the Symposium at New York City (1938) 11, 12
3A Barron and Holtzoff, Federal Practice and Procedure (Rules Ed. 1958), § 1711 ..... 8, 9, 17
3 Benedict, Admiralty (Knauth ed.), 34 5
IV Blackstone's Commentaries (11th Ed. 1791) 25
Bogue and Fritz, The Six-Man Jury, 17 S. Dak. L. Rev. 285 (Spring '72) 16
C. Chestnut, Analysis of Proposed New Federal Rules of Civil Procedure, 22 A. B. A. J. 533 (Aug. 1936) .. 11
Note on Rule 83 and the Local Federal Rules, 67 Columb. L. Rev. 1251 (Nov. '67) 11, 12, 13, 25
Devitt, The Six-Man Jury in the Federal Court, 53 FRD 273 (1971) 16, 17
Gibbons, The New Minijuries: Panacea or Pandora's Box? 58 ABAJ 594 (June, 1972) 16, 21, 24
H. Kalven, Jr., The Jury, the Law and the Personal Injury Damage Award, 19 Ohio St. L. J. 158 (1958) 15

Kalven & Zeisel, The American Jury (Little Brown and Company, 1966) 4, 14, 25

Maris, Federal Procedural Rule-Making: The Program of the Judicial Conference, 47 A. B. A. J. 772 (Aug., 1961) 7

The Local Rules of Civil Procedure in the Federal District Courts—a Survey, 1966 Duke L. J. 1011..... 13

Zeisel, And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710 (Summer '71) 4, 14, 15

Zeisel, The Waning of the American Jury, 58 A. B. A. J. 367 (April '72)..... 14, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-1442.

ROLAND V. COLGROVE,

Petitioner,

against

HONORABLE JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION,

Respondent.

Civil No. 783.

ROLAND V. COLGROVE,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

BRIEF OF INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL AS AMICUS CURIAE.

SUMMARY OF ARGUMENT.

The instant six-member jury rule and all similar local jury rules of the federal District Courts are beyond the limited rule-making power of the District Courts for the following reasons. (1) They represent "basic procedural in-

novations" which are forbidden to District Courts under the doctrine of *Miner* v. *Atlass*, 363 U. S. 641 (1960). (2) They substantially decrease the chances of representation of minority viewpoints on the jury and substantially increase the risk of what might be termed "far-out" verdicts. (3) They frustrate the policy of the jury selection statutes to maximize the chances of obtaining juries representative of a "fair cross section" of the community and the policy of the peremptory challenge statute that not more than one-half of a jury may be unseated by peremptory challenges. (4) They conflict with the express grant of authority to the parties under Rule 48, F. R. Civ. Pro., to stipulate to a jury larger or smaller than six members. (5) They conflict with the intent, implicit in Rule 48, that a stipulation of the parties should be the *sole* means of reducing the jury to less than twelve members. (6) These local jury rules, in their diversity, create a "procedural Tower of Babel"* in a "field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed".**

---

* See footnote 21, *infra*.

** *Miner* v. *Atlass*, 363 U. S. 641, 649 (1960).

ARGUMENT.

I.

THE CIVIL JURY SYSTEM SHOULD BE PRESERVED IN ALL BASIC ESSENTIALS AND ANY SIGNIFICANT CHANGES IN IT SHOULD BE MADE ONLY BY LEGISLATION OR AMENDMENT OF THE FEDERAL RULES OF CIVIL PROCEDURE.

International Association of Insurance Counsel[1] wishes to express its appreciation to the Court and to the parties for the opportunity to submit a brief *amicus curiae* in this proceeding.

It is planned to leave to able counsel for the parties discussion of the important constitutional and statutory points in this case, while limiting this brief to a single issue of prime concern to the I. A. I. C. membership: the scope of the rule-making power of United States District Courts, as applied to the instant six member jury rule.

To say that two thousand trial lawyers, as diversified in background and experience as the members of this Association, do not speak with a single voice, is to put it mildly. We venture to predict, nevertheless, that an overwhelming majority of our members would agree upon three propositions:

1. International Association of Insurance Counsel (I. A. I. C.) is composed of more than two thousand insurance defense counsel (both house counsel and independent trial counsel) in all parts of the United States and Canada. Membership includes lawyers from large communities and small, large firms and small, trial specialists and general practitioners, lawyers whose practice is virtually confined to defense work, and lawyers who occasionally find themselves sitting at the plaintiff's bar.

(1) Constitutional requirements aside, our jury system in all important essentials should be preserved for *civil*, as well as criminal, trials.[2]

(2) To the extent possible, without encroachment upon its essence,[3] our jury system should be sufficiently flexible to permit its adaptation to the needs of changing times.

(3) Basic trial and appellate procedures should apply uniformly throughout the federal court system, and fundamental procedural changes, such as rules which cut in half the traditional twelve-member common law jury, should not be adopted without the kind of widespread and thorough consideration which attends the amendment of the Federal Rules of Civil Procedure.[4]

---

2. The supporters of the jury system tend to share these perceptions: (i) They are skeptical of the ability of any one man or judge, however gifted, to form his judgments in the cool light of reason, unswayed by predeliction, passion or prejudice. (ii) They do not share Herbert Spencer's contempt for the "twelve people of average ignorance" (Kalven & Zeisel, *The American Jury* [Little Brown and Company, 1966] p. 6). (iii) They recognize that the intelligence and sensibility required of jurors is not the product of book-found knowledge, but the wisdom born of human experience and the compassion born of human suffering. (iv) They have not infrequently perceived in the collective verdict of juries a keen eye for truth, a sensitive nose for fraud or sham, a voice of moderation and an instinctive sense of right and wrong, which is the measuring stick of justice. Are not these the perceptions on which we have staked our very system of government?

3. If it be conceded, as declared in *Williams* v. *Florida*, 399 U. S. 78 (1970), that fixing the number of jurors at twelve was an historical accident, "wholly without significance 'except to mystics'" (399 U. S. p. 102), it remains true, nevertheless, that the *size* of a jury may be of the essence. It must be large enough to "provide a fair possibility for obtaining a representative cross-section of the community" (399 U. S. p. 100). It must be small enough to "remain manageable", Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 712 (Summer '71). Cp. 28 U. S. C. § 1861, Jury must be selected from "a fair cross-section of the community."

4. See 28 U. S. C. § 331, enjoining the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," and 28 U. S. C. § 2072, empowering the Supreme Court to "prescribe, by general rules

II.

THE INSTANT SIX MEMBER JURY RULE IS A "BASIC PROCEDURAL INNOVATION," BEYOND THE RULE-MAKING POWER OF A FEDERAL DISTRICT COURT UNDER THE DOCTRINE OF MINER v. ATLASS.

A. Major Procedural Changes Should Be Reviewed by the Judicial Conference and Reported to Congress, as in the Case of Amendments to the Federal Rules.

In *Miner* v. *Atlass*, 363 U. S. 641, 80 S. Ct. 1300, 4 L. Ed. 2d 1462 (1960), "basic procedural innovations" (363 U. S. p. 650) were held to be beyond the scope of the rule-making power of a federal district court.

Unlike the case at bar, *Miner* arose out of an admiralty suit and dealt with a local District Court rule, authorizing oral discovery depositions in admiralty.[5] Both *Miner* and the case at bar, however, were mandamus suits. Both suits were brought to test the validity of local procedural rules of United States District Courts. In both cases the procedural rules in question represented sweeping departures from long-standing tradition. And in both cases the rules of general application (General Admiralty Rules and Federal Rules of Civil Procedure, respectively) in similar terms extended to District Courts a broad grant of power

---

• • • the practice and procedure of the district courts of the United States in civil actions," subject to certain limitations, including a duty to report such rules to Congress and to "preserve the right of trial by jury as at common law." See also Report of Proceedings of Jud. Conf. of U. S. 3/15-16/71, pp. 5-6, adopting Resolution in favor of smaller juries, but referring back to committees the question, whether the means should be by "rule-making or statute". Two six member jury bills were introduced in the 92*d* Congress, H. R. 7800 by W. L. Scott of Virginia and H. R. 13,496 by E. Celler of New York. Neither was enacted, though the Justice Department endorsed the Celler bill.

5. *Miner* v. *Atlass*, *supra*, was decided some six years prior to the repeal of the separate admiralty rules (80 Stat. 323) and the general unification of the civil and admiralty rules of procedure, effective July 1, 1966.

to "regulate their practice" in any manner "not inconsistent with these [the general] rules."[7]

In a majority opinion, written by the late Mr. Justice Harlan,[8] the Court inferred from the carefully devised scheme for widespread review before adoption, of rules of practice and procedure prescribed by the Supreme Court, a general intention that all *basic procedures* should be covered by the Supreme Court rules so formulated, leaving the "interstices" to "be the subject of appropriate local regulation" (363 U. S. p. 648.) Accordingly, by way of judicial gloss, the Court read into the grant of District Court rule-making power an implicit prohibition[9] against the adoption of local rules, constituting "basic procedural innovations":

> "[T]he matter is one which, though concededly 'procedural,' may be of as *great importance to litigants* as many a 'substantive' doctrine, and which arises in a field of federal jurisdiction where *nationwide uniformity has traditionally always been highly esteemed.*
>
> "The problem then is one which peculiarly calls for exacting observance of the statutory procedures sur-

7. Cp. General Admiralty Rule 44 with Rule 83 F. R. Civ. Pro. See also 28 U. S. C. § 2071, which confers upon "all courts established by Act of Congress" power to "prescribe rules for the conduct of their business," consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

8. The majority was composed of six justices: Chief Justice Warren, and Associate Justices Black, Frankfurter, Clark, Harlan and Whittaker.

9. The Court found no *express* inconsistency between the local discovery deposition rule and the General Admiralty Rules. It did infer from the failure to incorporate into the General Admiralty Rules, Rule 26 F. R. Civ. Pro., authorizing discovery depositions in civil cases, a deliberate intention not to "*impose* the [discovery deposition] practice on the District Courts." But it recognized that the non-incorporation of Rule 26 F. R. Civ. Pro. "does not necessarily bespeak an intention to foreclose each District Court from exercising a 'local option' under Rule 44 "to adopt discovery deposition rules." (See *Miner* v. *Atlass, supra,* 363 U. S. p. 648.)

rounding the rule-making powers of the Court, see 28 U. S. C. § 331, 28 U. S. C. A. § 331 (advisory function of Judicial Conference[10].), 28 U. S. C. § 2073, 28 U. S. C. A. § 2073 (prior report of proposed rule to Congress), designed *to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters* with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Miner* v. *Atlass*, 363 U. S. pp. 649-650. (Emphasis supplied.)

The dissentors[11] in *Miner*, pointing out that "over half the admiralty litigation in the federal courts is conducted in courts having discovery-deposition rules like the one today nullified," could not agree to "a judgment which lightly brings about so widespread a turning back of the clock in the admiralty practice through the Nation." (363 U. S. p. 652-653.) In their view, "the Court's opinion fails completely to demonstrate a lack of power to promulgate the rule in question" (363 U. S. 654) and "there is nothing in General Rule 44 confining the local rulemaking power to exercises in the trivial." (363 U. S. 655.) The dissentors summarized their threefold objections to the majority decision, as follows (363 U. S. p. 665):

> "The Court's action nullifies these many local admiralty discovery-deposition rules, and casts an uncertain cloud over other local admiralty and civil rules. It creates an unfortunate hiatus in the development of discovery in admiralty by postponing the further collection of practical experience in the matter until a General Rule can be produced."[12]

---

10. See Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A. B. A. J. 772 (Aug. 1961).

11. The dissenting opinion was written by Mr. Justice Brennan, joined by Messrs. Justices Douglas and Stewart.

12. Since this Court handed down its decision in *Miner* v. *Atlass*, *supra*, 363 U. S. 641 (1960), the case has been cited by this Court only three times. See *Goldlawr, Inc.* v. *Heiman*, 369

The principle, announced in *Miner* v. *Atlass, supra,* 363 U. S. 641, 650 (1960), that "basic procedural innovations" are beyond the admiralty rule-making power of a federal District Court, obviously applies with equal force to a District Court's civil suit rule-making power. This is particularly true, in view of the close similarity between the grant of admiralty rule-making authority under General Admiralty Rule 44 and the grant of civil suit rule-making authority under Rule 83 of the Federal Rules of Civil Procedure.[13] Recognizing that the implications of the doctrine of *Miner* v. *Atlass* extend into the realm of local civil rule-making, the 1971 Pocket Part of Barron and Holtzoff's treatise on Federal Practice and Procedure includes this warning:

> "In the light of this decision [*Miner* v. *Atlass,* 363 U. S. 641 (1960)], it is possible that some of the more far-reaching local rules recently adopted, discussed in section 1713, may not be valid," 3A Barron and Holtzoff, Federal Practice and Procedure [Rules Ed. 1958], 1971 Pocket Part, § 1711 p. 68.

Thus in *Farmer* v. *Arabian American Oil Company,* 285 F. 2d 720, 722 [2d Cir. 1960], the court criticized and (as

---

U. S. 463, 468, 82 S. Ct. 913, 917, 8 L. Ed. 2d 39, 43 (1962) holding that a federal court, lacking both personal jurisdiction and venue, may transfer case to another federal court having both; *Fitzgerald, Public Administrator* v. *United States Lines Co.,* 374 U. S. 16, 22, 83 S. Ct. 1646, 1651, 10 L. Ed. 2d 725 (1963) holding that Jones Act claim and admiralty claim for maintenance and cure must be tried to jury together; *Harris* v. *Nelson,* 394 U. S. 286, 307, 89 S. Ct. 1082, 1094, 22 L. Ed. 2d 281, 295 (1969) holding interrogatories a permissible procedure in habeas corpus proceeding. Each of these citations to *Miner* was in a dissenting opinion by Mr. Justice Harlan, in which he suggested that the Supreme Court, itself, should refrain from adopting what he regarded as innovative procedures, without first submitting them to the Judicial Conference and to Congress, as required in the case of adoption of new Federal Rules of Procedure.

13. The striking similarity between General Admiralty Rule 44 and Rule 83, F. R. Civ. Pro. was noted by Mr. Justice Brennan in the dissenting opinion in *Miner* v. *Atlass,* 363 U. S. 641, 655.

applied in that case to exact a $6,000 bond) held invalid, a local District Court rule, requiring non-residents to post a cost bond of $250, subject to increase or decrease in the court's discretion.

Again, in *First National City Bank of New York* v. *Aristeguieta*, 287 F. 2d 219 [2d Cir., 1960], it was held on the strength of the *Miner* doctrine that the importation into extradition proceedings of the subpoena *duces tecum* procedure was a "basic procedural innovation" beyond the power of a federal judge sitting as an extradition magistrate:

> "Implicit in Miner, however, is the warning that federal courts must proceed with extreme caution when asked to sanction basic procedural innovations which lie in that misty land where judicial and legislative powers meet." (287 F. 2d p. 225.)

In another application of the *Miner* doctrine, the United States Customs Court held that summary judgment procedures were "basic procedural innovations" which it had no power to utilize in a custom proceeding, *Weather-Rite Sportswear Co.* v. *U. S.*, 298 Fed. Supp. 508, 514 (1969).[14]

See also *Louisville Builders Supply Company* v. *Commissioner*, 294 F. 2d 333, 342 [6th Cir. 1961], holding deposition to perpetuate testimony not proper in tax court; *Gamble* v. *Pope & Talbot, Inc.*, 307 F. 2d 729, 732 [3rd Cir. 1962], holding District Court not authorized to fine counsel for late filing of pre-trial memorandum; *Federal Maritime Commission* v. *Anglo-Canadian Shipping Co.*, 335 F. 2d 255 [9th Cir. 1964], holding that grant of rule-making power

14. But see *Allen Forwarding Co.* v. *United States*, 340 Fed. Supp. 412 (1972), wherein the Customs Court utilized, and did not question the validity of, a local rule of the Customs Court, adopted in 1970, providing for summary judgment. This would clearly seem to be one of those "far reaching local rules," the validity of which, in the light of *Miner*, was called in question in 3A Barron and Holtzoff, Federal Practice and Procedure (1971 Pocket Part § 1711).

under Merchant Marine Act did not extend to Maritime Commission the right to adopt discovery rule on production of documents; *Socony Mobil Oil Company, Inc.* v. *The S. S. Pacific Tide,* 189 Fed. Supp. 724 (S. Dist. N. Y., 1960), holding summary judgment procedure not permissible in admiralty; and *Sea Trade Corporation* v. *Bethlehem Steel Company, Shipbuilding Division,* 192 Fed. Supp. 913 (S. Dist. N. Y., 1961), reaching same result.[15] All of these decisions were grounded on authority of *Miner* v. *Atlass, supra.*

B. Comments of the Draftsmen of the Federal Rules of Civil Procedure Show That the Purpose of Rule 83 Was to Enable District Courts to Make Limited Local Rules in Interstitial Areas.

Strong support for the theory that the grant of District Court rule-making power under Rule 83, F. R. Civ. Pro. was not intended for "basic procedural innovations," but merely for limited use in interstitial areas not covered by the Federal Rules, is found in the comments of those who participated in the drafting of the Federal Rules.[16]

Thus, Edgar Tolman, Secretary of the Advisory Committee is reported to have said that the function of Rule 83 was to enable District Court to fill "gaps" deliberately left in the Federal Rules where the subject matter was too

15. But see *Wirtz* v. *Hooper-Holmes Bureau, Inc.*, 327 F. 2d 939 [5th Cir. 1964], upholding validity of local District Court rule, requiring disclosure of witness list at pre-trial conference on ground that this was common practice and Supreme Court Rules Committee had expressly declined to amend Rule 16, F. R. Civ. Pro. to provide for it on the theory that it was better left to local option.

16. The Supreme Court has recognized the relevance of such statements to the interpretation of the Rules. *Mississippi Publishing Corp.* v. *Murphree,* 326 U. S. 438, 444-445 (1946):

> "But in ascertaining their [the Federal Rules'] meaning the construction given to them by the [Advisory] Committee is of weight."

variant for specification or of peculiarly local concern. He added, however, that such gaps were few because of the *comprehensiveness* of the Federal Rules[17], and that most gaps had resulted from a decision that the particular situation, not dealt with by the Rules, was *rare or relatively unimportant* or better handled on an *ad hoc* basis.[18] Said Mr. Tolman with reference to Rule 83:

> "[I]t *permits judges to decide the unusual or minor procedural problems* that arise in any system of jurisprudence in the light of the circumstances that surround them and of the justice of the case without the complications and injustice that must attend attempts to forecast the situations and to regulate them in advance either by general or by local rule.'"[19]

Tolman also expressed the fear that trial courts were passing too many local rules, thus frustrating the draftsmen's hope for a "simple, flexible, manageable mechanism with as few rules as possible."[20]

William Mitchell, Chairman of the Advisory Committee felt that the federal rules were meant to cover adequately most procedural questions and was critical of the plethora of local rules, designed to add detail to the Federal Rules, on the ground that they tend "to destroy uniformity in

---

17. "One is also impressed with the comprehensive scope of the subject matter which regulates the whole procedure in civil actions in law and equity from the issuance of the summons and the filing of the first paper in the litigation throughout every stage of its progress in the trial court * * *", Hon. W. Calvin Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A. B. A. J. 533, 534 (Aug. 1936).

18. See summary of Tolman's remarks in Note on Rule 83, 67 Columb. L. Rev. 1251, 1255 (Nov. '67).

19. A. B. A., Federal Rules of Civil Procedure, Proceedings of the Institute at Washington and of the Symposium at New York City (1938) p. 129.

20. Note on Rule 83, 67 Colum. L. Rev. 1251, 1256.

practice throughout the United States.'"[21] He stated that if the District Courts continued to use Rule 83 to "add meticulous details that they think improve the Supreme Court rules, simplicity and flexibility will be removed, and uniformity will be destroyed * * *"[22]

The conclusions of the Committee on Local District Court Rules (Knox Committee), appointed by the Chief Justice in 1938 were in the same vein:

> "Apparently the Supreme Court and its Advisory Committee intended as far as possible *to cover generally in the Federal rules all aspects of the civil practice that need to be regulated in advance by rule of court, and to leave to the discretion of the trial judge the conduct of details of procedure* and the regulation of unusual situations as they arise in litigation and as the circumstances and the justice of the case may demand. Rule 83 of the Federal Rules of Civil Procedure strongly evidences this purpose by the very significant provision of its last sentence * * * The conclusion that most district courts can function with very few local rules is fortified by communications received from numerous judges who state that *the Federal Rules of Civil Procedure without supplement of any nature are quite sufficient for their needs.*"[23] (Emphasis supplied.)

The Columbia Law Review note on *Rule 83 and The Local Federal Rules* makes these cogent observations:

---

21. Op. cit. note 19, p. 327. Mr. Mitchell's words proved prophetic. Thirty years later, in testimony before the House Judiciary Committee on April 21, 1967, Professor Rosenberg had this to say:

> "[D]istrict courts around the country are spawning [local rules] in great numbers. The Federal courts of this country are becoming a kind of *procedural Tower of Babel because of the differences in local rules*" See op. cit. note 20, p. 1259.

22. Op. cit. note 19, p. 232.

23. Knox Report p. 10, as quoted in op. cit. note 20, pp. 1257-1258.

"No general analytical guidelines for weighing the desirability or validity of a given local rule have been developed.[24] As a result, the majority of district courts have, in promulgating rules, ignored the principles of simplicity, scarcity and uniformity which guided the formulation of the Federal Rules. *At times, district courts have used their power under Rule 83 to negate specific requirements of the Federal Rules; more often, simply to escape from the arduous but essential task of case-by-case analysis.*"[25] 67 Columb. L. Rev. pp. 1251-1252 (Nov. 1967) (Emphasis supplied.)

III.

TO CUT IN HALF THE TRADITIONAL SIZE OF JURIES IS A "BASIC PROCEDURAL INNOVATION" OF NO SMALL CONSEQUENCE.

Based on the admittedly "few experiments" with six member juries which had preceded *Williams* v. *Florida*, 399 U. S. 78, 101-102, 90 S. Ct. 1893, 26 L. Ed. 2d 446, 460-461 (1970), this Court concluded in that case "that there is no discernable difference between the results reached by the two different-sized juries", and added:

> "Similarly, while in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible".

Since *Williams*, a voice that deserves to be heard has taken sharp issue with the above conclusion. The voice is that of Professor Hans Zeisel, a participant in the Univer-

24. Cited as exceptions, are the Knox Report and *Miner* v. *Atlass*, 363 U. S. 641 (1960).

25. See also the exhaustive note on *The Local Rules of Civil Procedure in the Federal District Courts—a Survey*, 1966 Duke L. J. pp. 1011-1112, which takes note of a comment of Professor Charles Alan Wright that the local rules represent the "soft underbelly" of federal procedure (p. 1012).

sity of Chicago Law School's extended study of the Ameri can jury system, co-author with Professor Harry Kalve of *The American Jury* (Little Brown & Co., 1966) (a com parative study of judge vs. jury conclusions in more than 3500 scientifically selected jury trials across the nation),[26] a statistician,[27] and surely one of this country's foremost authorities on jury behavior. After pinpointing and then forthrightly dismissing as "scant evidence by any standards"[28] the six citations of authority on which the "no discernible difference" conclusion in *Williams* was based, Professor Zeisel convincingly demonstrates that there is a difference of substantial proportions.

His chief point cuts to the core of the constitutional[29] and statutory goal that a jury be representative of a "fair cross-section of the community."[30] For purposes of illustration, he assumes that a 10% minority within a particular community share a particular viewpoint on some controversial issue, such as capital punishment or the desirability of schoolbussing. Assuming the selection by lottery of 100 twelve member juries and 100 six member juries, he poses the question: how often would the minority viewpoint probably be represented on the smaller jury as compared with the larger? Statistically, his answer is this:

> "Of the 100 twelve-member juries, approximately 72 would have at least one representative of that minority; while of the 100 six-member juries, only 47 would

---

26. See *The American Jury*, Ch. 3, p. 33 et seq.

27. See profile in 58 A. B. A. J. p. 368 (Apr. 1972).

28. Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 715 (Summer '71), which is recapitulated in Zeisel, *The Waning of the American Jury*, 58 ABAJ 367 (April '72).

29. "To be sure, the number should probably be large enough to promote group deliberation • • • and to provide a fair possibility for obtaining a representative cross-section of the community," *Williams* v. *Florida*, 399 U. S. 78, 100.

30. 28 USC § 1861, 82 Stat. 54, as amended 3/27/68.

have one. It is clear, then, that however limited a twelve-member jury is in representing the full spectrum of the community, the six-member jury is even more limited, *and not by a 'negligible' margin,"* Zeisel, *And Then There Were None*, 38 U. Chi. L. Rev. 710, 716.

Inherent in the desire to obtain juries, representing a "fair cross-section of the community", is the notion that a jury so balanced is likely to, and hopefully will, reach a *centrist* result,[31] somewhere in between the extremes of opinion in the community. Zeisel confirms the reality of this assumption, stating, as applied to damages, for example, that "whatever the composition of the jury, the damages it awards will lie around the average of the evaluations of all individual jurors."[32] Again assuming 100 randomly selected twelve member juries and a like number of six member juries, he tabulates the statistically probable results to determine how often the 12 man jury is likely to deviate from the norm, as compared with the 6-man jury. His results indicate that about 68% of the 12-man verdicts will fall within the mid-range on damages, as compared with only about 51% of the 6-man verdicts. His results also show that only about 4% of the 12-man verdicts will reach extremes of damages on the high or low side, as compared with 16% of the verdicts of 6-man juries. He calculates that the "standard deviation" or spread of jury verdicts is about 42% greater in the case of the 6-man jury than in the case of the 12-man jury.[33] Can a 42%

31. "The great point is that a jury verdict is a group product; that the jury is not simply an atomistic electorate, but must work to a solution which is at least tolerable to all twelve. One result is that the filtering of individual eccentricity through the group process furnishes a major safeguard in the jury system", H. Kalven, Jr., *The Jury, the Law and the Personal Injury Damage Award*, 19 Ohio St. L. J. 158, 176 (1958).

32. 38 U. Chi. L. Rev. 710, 716. See also Kalven, op. cit. note 31, p. 177.

33. 38 U. Ch. L. Rev. pp. 717-718.

increase in the gamble that a lawyer and his client take in trying a case be passed off as "negligible"?

In the face of these very real and substantial differences between the six member jury and the traditional twelve member jury, the question arises, is the game worth the candle?

Chief Judge Edward J. Devitt of the United States District Court for the District of Minnesota, whose Court led the headlong rush of federal District Courts to adopt six member jury rules,[34] enthusiastically forecast nationwide cost savings of $1,600,000 from the change. Devitt, *The Six Man Jury in the Federal Court*, 53 FRD 273, 277 (1971). "Substantial savings" in time have also been forecast.[35]

Putting these factors into perspective, however, Hans Zeisel offers some sobering statistics:

> "But the money saved by having six-member civil juries in the federal courts amounts to about *2.5 per cent of the federal judicial budget* and to a little more than a thousandth part of 1 per cent of the total federal budget. As to the time likely to be saved, the best estimate is *three tenths of 1 per cent of the judge's working time*", Zeisel, *The Waning of the American Jury*, 58 A. B. A. J. 367, 370 (Apr. '72) (Emphasis supplied.)

---

34. David J. Gibbons of the Chicago Bar, in a thoughtful and penetrating survey of the constitutional and legal problems, which cast doubt on the validity of these six member jury rules, pointed out that 43 of the 92 federal districts had abandoned twelve member civil juries during the interval of less than eighteen months between January 1, 1971, when the Minnesota District Court made its move, and the date of his article. Gibbons, *The New Minijuries: Panacea or Pandora's Box?*, 58 ABAJ 594 (June, 1972).

35. Bogue and Fritz, *The Six-Man Jury*, 17 S. Dak. L. Rev. 285, 288 [Spring '72]. There seems, however, to be a conspiracy of silence about the major saving of *deliberation time*, which will doubtless result from the six member jury. Could it be that no one wants to admit that with no more than six points of view to be reconciled, verdicts will receive only *one-half the consideration* that they used to receive?

IV.

THE THEORY THAT DISTRICT COURTS ARE FREE TO FIX BY LOCAL RULE THE SIZE OF CIVIL JURIES CONFLICTS WITH THE POLICY OF THE JURY SELECTION STATUTES.

Rule 83, F. R. Civ. Pro., has the virtue of brevity and the vice of incompleteness. For all that appears on the face of Rule 83, the rule-making power of District Courts is plenary, subject to the single limitation that local rules be "not inconsistent with these rules", i.e. the Federal Rules of Civil Procedure. But, of course, in addition to the "basic procedural innovations" limitation, there are other limitations that do not meet the eye. As pointed out in Barron and Holtzoff, local rules must be "reasonable"; they must be "uniform and non-discriminatory" and they must be "consistent with Acts of Congress" (citing 28 U. S. C. § 2071.) See 3A Barron and Holtzoff, *Federal Practice and Procedure* [Rules Ed. 1958] § 1711, p. 179.

It is submitted that the instant six-member jury rule, as well as those of the other federal District Courts, is completely at odds with the policy, expressed and implied in the jury selection statutes (28 U. S. C. §§ 1861 et seq., as amended March 27, 1968, Pub. L. 90-274 § 101, 82 Stat. 54.)

> 28 U. S. C. § 1861 declares in pertinent part:
> "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a *fair cross-section of the community* in the district or division wherein the court convenes. * * *"
> (Emphasis supplied.)

Section 1863 of the statute then expounds at length provisions for the establishment, operation and review by a reviewing panel of "a written plan for random selection of grand and petit jurors that shall be designed to achieve

the objectives of sections 1861 * * *" Paragraph (b)(3) of this section requires the plan to be designed to "*insure the random selection of a fair cross-section of the persons residing in the community* * * *". Paragraph (b)(4) requires the plan to "fix a *minimum number* of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division * * *". (Emphasis supplied.)

Here, then, are meticulous provisions for a carefully reviewed plan of jury selection, *designed to maximize the chances that the jury ultimately seated in the jury box will represent a "fair cross section" of the community.* Even the *minimum number* of names is specified, in order to insure a large enough sampling to be representative.

But, obviously, the representative character of a jury is only in part a function of the representative character of the array from which the jury is chosen. It also depends in substantial part upon the *size* of the jury ultimately seated. Having gone to such lengths to ensure that the array would in all likelihood be representative of a "fair cross-section" of the community, it is unthinkable that Congress could have intended to risk the frustration of that objective by leaving to the unchecked discretion of the judges of ninety-two separate federal districts the decision on the key question of jury size. As stated in *Winsby* v. *John Oster Manufacturing Company*, 336 Fed. Supp. 663, 666 (1972) (now pending on appeal to the Third Circuit, No. 72-1256):

> "Congress has recently demonstrated its intent to deal with the subject of jury selection by enacting comprehensive legislation, chiefly designed to ensure representation of a broader spectrum or cross-section of the community upon jury panels. *Nowhere in this system is there any suggestion that juries of less than twelve were contemplated*". (Emphasis supplied.)

The peremptory challenge statute (28 U. S. C. § 1870) also reflects the Congressional intent that the question of jury size should not be entrusted to the divergent viewpoints of individual District Courts. The three peremptory challenges, specified for each side, were plainly geared for twelve-member juries. Cut the jury in half and peremptory challenges can unseat the entire jury. What does this do to the prospects of seating a jury representative of a "fair cross-section" of the community?

Unquestionably, Congress intended that *not more than one-half* of a civil jury could be displaced by means of peremptory challenges. It is equally beyond question that Congress did *not* intend to permit District Courts to defeat that limitation by reducing the size of juries, least of all on a piecemeal and *non-uniform* basis.[36]

If, as stated in *Miner* v. *Atlass*, 363 U. S. 641, 650, 80 S. Ct. 1300, 1306, 4 L. Ed. 2d 1462, discovery is a "field of federal jurisdiction where *nationwide uniformity* has traditionally always been highly esteemed" (emphasis supplied), the same is even more true of the traditional twelve-member federal jury.

V.

THE INSTANT SIX MEMBER JURY RULE IS INCONSISTENT WITH RULE 48 OF THE FEDERAL RULES OF CIVIL PROCEDURE, PERMITTING REDUCTIONS IN THE SIZE OF JURIES BY STIPULATION ONLY.

Rule 48, F. R. Civ. Pro., provides:

> "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury".

36. Cp. the instant Montana District Court six member jury rule with Rule 29½ of the Eastern District of Pennsylvania, which provides for trial to an *eight member* jury, in the absence of a demand for twelve members. Clearly, the peremptory challenge statute is not adaptable to juries of divergent shapes and sizes.

It is submitted that Rule 48 has a double impact: (1) It contains an affirmative grant to the parties of authority to stipulate to a jury of "any number less than twelve"; (2) Implicit in it is the belief, and, therefore, the intention, that such a stipulation shall be the *sole* means of reducing the size of the jury below twelve.

Rule 13(d)(1) of the United States District Court for the District of Montana, as amended effective September 1, 1971, provides:

> "1. A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled."

Thus, it freezes the civil jury at six members. Unlike some of the other local jury rules, e.g. the Southern District of Illinois and the District of Kansas, which provide for six members "except as may be otherwise expressly required by law or controlling rule", the Montana Rule purports to restrict the jury to six members, even in the face of a Rule 48 stipulation of the parties to a jury larger or smaller than six members. To this extent, the Montana six-man jury rule is undoubtedly invalid, under the express proviso of Rule 83 F. R. Civ. Pro., that local rules be "not inconsistent with these rules".

Both the Ninth Circuit in *Colgrove* v. *Battin*, 456 F. 2d 1379 [9th Cir. 1972] and the Fifth Circuit in *Cooley* v. *Strickland Transportation Company*, 459 F. 2d 779 [5th Cir. 1972], rejected the contention that their respective six member jury rules were in conflict with Rule 48.[36A]

The Ninth Circuit's nearest approach, in its opinion, below, to confronting the issue of the parties' right to

36A. This issue is now pending on appeal to the Third Circuit in *Winsby* v. *John Oster Manufacturing Company* (No. 72-1256) and to the Seventh Circuit in *Levy* v. *Lawnmaster, Inc.* (No. 72-1171).

stipulate to the size of the jury is found in the following statement:

> "To read it [Rule 48, F. R. Civ. Pro.] to provide means for enlarging the jury, i.e. as an affirmative grant of a *right* to the parties to demand more than the law otherwise requires, is to stand it on its head". *Colgrove* v. *Battin*, 456 F. 2d 1379, 1381.

When the Ninth Circuit speaks of "enlarging the jury" and demanding "more than the law otherwise requires", the questions arise, "enlarging the jury" from *what* number and demanding more than *what* "law otherwise requires"? As David J. Gibbons cogently observed in his article, questioning the validity of the six member jury rules in general and the logic utilized in *Colgrove* in particular,

> "The only 'law' that requires fewer than twelve jurors is the very local rule which that court had under consideration. What the court actually did in *Colgrove* was to abrogate Rule 48 in deference to the local rule being challenged". Gibbons, *The New Minijuries: Panacea or Pandora's Box?* 58 A. B. A. J. 594, 597 (June '72)

Like Rule 13(d)(1) of the Montana District Court, Rule 13 of the Western District of Louisiana also purported to freeze the number of jurors at six members, irrespective of any contrary stipulation of the parties.[37] In upholding the validity of the Louisiana District rule, as against the contention that it deprived the parties of their right under rule 48 to stipulate to a jury of more or less than six, the Fifth Circuit in *Cooley* v. *Strickland Transportation, supra,*

37. It also provided for three peremptory challenges to each opposing party, plus a fourth peremptory challenge in the event of the empanelling of an alternate juror in a lengthy case. Query, whether this is in conflict with the peremptory challenge statute (28 U. S. C. § 1870)? See W. Dist. Louisiana local rule 13, eff. 4/15/71.

brushed past the argument with the following comment (459 F. 2d p. 784):

> "Rule 48, however, deals only with a stipulation by '*[t]he parties*'. It does not purport to prevent *court rules* which provide for civil juries of reduced size." (Emphasis, the court's.)

It is indeed true that Rule 48 deals with a stipulation by "the parties" and it necessarily prevents any local court rule which operates to deny to the parties their right to stipulate to a jury of some number other than six.

Both the Ninth Circuit in the instant case and the Fifth Circuit in *Cooley, supra,* refused to read into Rule 48 a negative intent to prohibit reductions in the size of juries in the absence of a stipulation of the parties. Both courts rested their conclusion in this respect on the fact that Rule 48 was promulgated at a time prior to *Williams* v. *Florida*, 399 U. S. 78, 90 S. Ct. 1893 (1970), when it was generally supposed that twelve member juries were a constitutional mandate. In the light of *Williams,* they felt that Rule 48 could no longer be construed as requiring twelve member juries.[38] See *Colgrove* v. *Battin*, 456 F. 2d 1379, 1381 (9th Cir. 1972) and *Cooley* v. *Strickland Transportation Company*, 459 F. 2d 779, 784-785 [5th Cir. 1972].

We respectfully submit that the conclusions of the Fifth and Ninth Circuits with respect to the effect of the *Williams* decision on Rule 48 are conceptually unsound. It is a fundamental principle of construction that a rule or other enactment is to be interpreted in accordance with the apparent intention of those who framed it *at the time of its enact-*

38. See *Fox* v. *United States*, 417 F. 2d 84 (5th Cir., 1969), construing Rule 48 to require a unanimous verdict by a jury of twelve. See also *Bourne* v. *A. T. & S. F. Ry. Co.*, No. 46,637, wherein the Supreme Court of Kansas recently held that under a Kansas statute *identical to Rule 48*, "litigants in the district court are entitled to have their cases tried by a jury of not less than 12 members unless there is a stipulation by the parties to the contrary."

ment. As the Ninth Circuit conceded in *Colgrove,* 456 F. 2d p. 1381:

> "Rule 48 must, we feel, be read in light of the fact that at the time of promulgation a jury of twelve was the only jury known to the federal law and was thought to be constitutionally required."

This being true, the draftsmen of Rule 48 obviously believed and intended to provide by that rule the *exclusive means* of reducing the size of the jury below twelve.

To suppose, as did the Fifth and Ninth Circuits in *Cooley* and *Colgrove,* that the draftsmen of Rule 48 would necessarily have had a *different* intention, had they known that the twelve member jury was not constitutionally required, presumes too much. It may well be the conclusion of this Court that a stipulation of the parties under Rule 48 should remain the *exclusive means* of providing for smaller juries. Least likely and least desirable of all, we submit, is the conclusion that decision on the size of juries should be left to the vagaries of more than ninety separate Federal District Courts.

VI.

CONCLUSION.

The United States District Courts are staffed by able, conscientious and well respected judges. It is respectfully submitted, nevertheless, that they have overstepped the limited grant of rule-making power, bestowed upon them under the Federal Rules, and never more so than in the case of the stampede to adopt six-member jury rules, which followed this Court's decision in *Williams* v. *Florida,* 399 U. S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

In taking this action, the District Courts presumed to anticipate a major change of constitutional interpretation, with respect to the Seventh Amendment, which the Supreme

Court expressly declined to make in *Williams* and has not made to this very day.[39] All of these local jury rules were adopted at a time when it remained the law of the land, as declared by this Court in a long line of cases, that trial by jury within the meaning of the Seventh Amendment means "a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them, * * *", *Capital Traction Company* v. *Hof*, 174 U. S. 1, 14, 19 S. Ct. 580, 43 L. Ed. 873 (1899).

By what license do District Courts take it upon themselves to make rules, which force parties to go to trial to a six member civil jury, the very constitutionality of which depends upon the accuracy of a forecast that this Court will reverse a long standing interpretation of the Seventh Amendment? Not only does such action put the litigants in a difficult situation, but it also puts this Court in the position of having to consider the effect upon cases heretofore tried under these local rules, should this Court decide that the Seventh Amendment requires twelve-member juries, after all.

The crux of the matter is that the District Courts have inflicted upon us more than forty hastily enacted jury rules of diverse application,[40] not even involving in all cases the same number of jurors. They have created what Professor Rosenberg aptly described as a "procedural

39. See *Williams* v. *Florida*, 399 U. S. 78, 92 note 30, 90 S. Ct. 1893, 1901 (1970). In *Winsby* v. *John Oster Manufacturing Company*, 336 Fed. Supp. 663, 664 (1972), Judge Dumbauld of the Western District of Pennsylvania stated that he had voted against his court's six member jury rule, because "prudence dictated awaiting a square holding by the Supreme Court of the United States sustaining the validity of such an innovation in the trial of civil and criminal cases in federal courts, rather than rushing in for reason of convenience and expediency * * *".

40. See tabulation appended to Gibbons, *The New Minijuries: Panacea or Pandora's Box*, 58 ABAJ 594, 597 (June '72) and text of various rules, Appendix A to *Cooley* v. *Strickland Transportation Company*, 459 F. 2d 779, 786-788 [5th Cir., 1972].

Tower of Babel because of the differences in local rules"[41] in a "field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed". See *Miner* v. *Atlass*, 363 U. S. 641, 649 (1960).

More than two centuries ago Blackstone gave this prophetic warning to a country which subsequently abandoned civil juries:

> "(L)et it be again remembered that *delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty* in more substantial matters; that these inroads upon this sacred bulwark of the nation [the jury system] are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, *the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.*" (Blackstone's Commentaries, Vol. IV, p. 350; 11th Ed. 1791, as quoted in Kalven & Zeisel, *The American Jury* (Little Brown & Company, 1966, p. 7.) (Emphasis supplied.)

The adoption of rules reducing below twelve members the size of civil juries should be held beyond the power of United States District Courts and the judgments below should be reversed.

Respectfully submitted.

WILLIAM A. WICK,
1000 Merchants Bank Building,
Indianapolis, Indiana 46204,
Attorney for Applicant.

Of Counsel for International
Association of Insurance Counsel:
ALSTON JENNINGS,
2200 Worthen Bank Building,
Little Rock, Arkansas 72201,
JOHN C. ELAM,
52 East Gay Street,
Columbus, Ohio 43215.

[41] Note on Rule 83, 67 Colum. L. Rev. 1251, 1259, note 20.

CERTIFICATE OF SERVICE.

This is to certify that on November 21, 1972, three (3) printed copies of this Brief Amicus Curiae were served upon each of the parties to the above-entitled action by depositing the same in the United States mail, with air mail postage prepaid, addressed to the parties' respective counsel of record, as follows:

Lloyd J. Skedd,
P. O. Box 1195,
1225—11th Avenue
Helena, Montana 59601,
Counsel for Petitioner.

Cale Crowley,
500 Electric Building,
Billings, Montana 59101,
Counsel for Respondent.

L. Morris Ormseth,
Seventh Floor,
First National Bank Building,
Great Falls, Montana 59403,
Counsel for Defendant.

William A. Wick
Attorney for International Association of Insurance Counsel.

INDEX

Table of Contents

	Page
The Opinion Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statutes and Rules Involved	2
Questions Presented	5
Statement of the Case	5
Summary of Argument	6
Argument:	7
I. The Seventh Amendment, unless the Parties Stipulate Otherwise, Requires that a Jury in Federal Civil Cases Consist of Twelve	7
II. Rules 1, 48 and 83 of the Federal Rules of Civil Procedure Require that a Civil Case be Tried before a Jury of Twelve unless the Parties Stipulate Otherwise	8
Conclusion	11
Certificate of Service	13

Cases Cited

Bogotay v. Montour R. Co., 177 F. Supp. 269 (D.C. Pa. 1959)	9
Capitol Traction Co. v. Hof, 174 U.S. 1, 43 L.Ed. 873, 19 S.Ct. 80 (1970)	7
Cedolia v. C.S. Hill Saw Mills, 41 F.R.D. 524 (D.C. N.C. 1967)	9
Dredge Corp. v. Penny, 338 F.(2d) 456 (9th Cir. 1964)	9

INDEX

Cases Cited (cont.)	Page
First National Bank of Henrietta v. Small Business Administration, 429 F.(2d) 280 (5th Cir. 1970)	9
Fox v. United States, 417 F.(2d) 84 (5th Cir. 1969)	9
Hanna v. Plumer, 380 U.S. 460, 14 L.Ed.(2d) 8, 85 S.Ct. 1136	11
Harris v. Nelson, 394 U.S. 286, 298, 22 L.Ed.(2d) 281, 89 S.Ct. 1082	9
Miner v. Atlass, 363 U.S. 641, 4 L.Ed.(2d) 1462, 80 S.Ct.1300	10
Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930)	8
Williams v. Florida, 399 U.S. 78, 26 L.Ed.(2d) 446, 90 S.Ct. 1893	7,8

U.S. Constitution Cited

Sixth Amendment	2
Seventh Amendment	2

Statutes Cited

Federal Rules of Civil Procedure:	
Rule 1	4,9
Rule 26	10
Rule 48	4,5,7 9,11
Rule 83	5,5 7,9

INDEX

Statutes Cited (cont.)	Page
80 Stat. 1323, Pub.L. 89-773, Sec. 2, Nov. 6, 1966	4
28 U.S.C., Section 1254(1)	2
28 U.S.C., Section 1414(b)	5
28 U.S.C., Section 2071	2
28 U.S.C., Section 2072	3,10
28 U.S.C., Section 2073	3

Miscellaneous

1B Moore's Federal Practice (2d), Section 0.512	11
2 Moore's Federal Practice (2d), Section 1.02	7
7 Moore's Federal Practice (2d), Section 83.03	7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1442

ROLAND V. COLGROVE,

Petitioner,

against

HONORABLE JAMES F. BATTIN,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF MONTANA,
BILLINGS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals is not yet officially reported. The court below refused to grant petitioner a writ of mandamus to force the United States District Court for the District of Montana to try this case before a jury of twelve persons. A copy of said opinion is found in the Appendix, page 23.

JURISDICTION

The order and decision of the United States Court of Appeals was entered on March 6, 1972. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * *."

Amendment VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

STATUTES AND RULES INVOLVED

28 U.S.C., Section 2071, provides:

"The Supreme Court and all courts established by

rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

28 U.S.C., Section 2072, provides:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

28 U.S.C., Section 2073, provided:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and

procedure in admiralty and maritime cases in the district courts of the United States and all courts exercising admiralty jurisdiction in the Territories and Possessions of the United States.

"Such rules shall not abridge or modify any substantive right.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court." Repealed. Pub.L. 89-773, Section 2, Nov. 6, 1966, 80 Stat. 1323.

Rule 1, Federal Rules of Civil Procedure, provides:

"These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 48, Federal Rules of Civil Procedure, provides:

"The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict of a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Rule 83, Federal Rules of Civil Procedure, provides:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. * * * In all cases not provided for by rules, the district courts may regulate their practice in any manner not inconsistent with these rules."

Rule 13(d)1 of the Revised Rules of Procedure of the United States District Court for the District of Montana provides:

> "A jury for the trial of civil cases shall consist of six persons * * *." (Amendment effective September 1, 1971)

QUESTIONS PRESENTED

(1) Did the court below err in holding that the Seventh Amendment to the Constitution of the United States does not require that a United States District Court try a civil case before a jury of twelve persons unless the parties stipulated otherwise?

(2) Did the court below err in holding that Rule 48 and Rule 83 of the Federal Rules of Civil Procedure do not require the trying of cases before a jury of twelve persons unless the parties stipulate otherwise?

STATEMENT OF THE CASE

The suit in the United States District Court for the District of Montana out of which the petition for writ of mandamus grew was an action for libel and jurisdiction of the case is invoked under Title 28, U.S.C., Rule 1414(b). There is diversity of citizenship between the parties hereto and the amount in controversy exceeds $10,000.00.

The United States District Court for the District of Montana passed Rule 13(d)1 of the Revised Rules of Procedure of said court, and the same became effective on September 1, 1971. (A. 28) Pursuant to Rule 13(d)1, the United States District Court set the trial of Civil No. 783 for September 27, 1971, to a jury consisting of six persons.

The plaintiff moved the court to try Civil No. 783 to a trial jury of twelve persons. The court denied this motion but rescheduled the trial of the case for October 12, 1971. (A. 1) Thereafter, the court vacated that setting and ordered that the resetting be subject to the direction of the Circuit Court of Appeals.

The petitioner, on or about October 4, 1971, petitioned the Circuit Court of Appeals for the Ninth Circuit for a writ of mandamus. (A. 2) Thereafter, and on March 6, 1972, the Circuit Court of Appeals handed down its order and opinion denying the petition for writ of mandamus. (A. 23)

On or about May 4, 1972, petitioner filed his petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this Court. On October 10, 1972, the petition for a writ of certiorari was granted.

SUMMARY OF ARGUMENT

This case presents the issue of whether a federal district court has the right or power to pass and enforce, against the desire of the parties, a ruling that a civil case be tried before a jury of six persons.

I.

We submit that by the use of the words "common law" twice in the Seventh Amendment, the proper interpretation of

of the amendment requires that this Court find that a civil case must be tried before a common law jury as it was composed at the time of the passing of the Seventh Amendment, which jury consisted of twelve persons unless the parties stipulated otherwise.

II.

Rule 83 of the Federal Rules of Civil Procedure provides that a federal district court may make rules, but they must not be inconsistent with the Federal Rules of Civil Procedure.

Rule 48 of the Federal Rules of Civil Procedure provides that the parties can stipulate to a jury of less than twelve members.

To allow a federal district court in a civil case to require that the case be tried before a jury of less than twelve persons, i.e. six persons, would be inconsistent with Rule 48 of the Federal Rules of Civil Procedure and beyond the power and authority of a district court and would violate one of the purposes of the Federal Rules of Civil Procedure, which is to make the rules uniform throughout the federal court system. See 2 Moore's Federal Practice (2d), Section 1.02; 7 Moore's Federal Practice (2d), Section 83.03.

ARGUMENT

I.

THE SEVENTH AMENDMENT, UNLESS THE PARTIES STIPULATE OTHERWISE, REQUIRES THAT A JURY IN FEDERAL CIVIL CASES CONSIST OF TWELVE

In *Capitol Traction Co. v. Hof*, 174 U.S. 1, 43 L. Ed. 873, 19 S.Ct. 80 (1970), this Court held that the Seventh Amendment guarantees a right to a jury of twelve persons.

This rule is not changed by this Court's decision in *Williams*

v. Florida, 399 U.S. 78, 26 L.Ed.(2d) 446, 90 S.Ct. 1893. By Note 30, 399 U.S. 92, the Court reserved for later decision whether or not the Seventh Amendment requires a jury of twelve members, in the following language:

> "* * * we do not decide whether, for example, additional references to the common law that occur in the Seventh Amendment might support a different interpretation."

At the time of the writing and adoption of the Sixth and Seventh Amendments, a common law jury consisted of twelve persons. *Williams v. Florida*, supra; *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854. For other authorities, see Note 19 found in the majority opinion in *Williams v. Florida*, supra.

We believe the writers of the Sixth and Seventh Amendments, at the time they were writing the same, must have felt there was a definite distinction between the Sixth and Seventh Amendments. Otherwise they would have used the same language in each. The additional reference to the common law leads us to believe that the founding fathers meant the people to have a right to a common law jury of twelve persons.

II.

RULES 1, 48 AND 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THAT A CIVIL CASE BE TRIED BEFORE A JURY OF TWELVE UNLESS THE PARTIES STIPULATE OTHERWISE

In this case, petitioner not only did not stipulate to try the case before a jury of less than twelve, but moved the court for the case to be tried before a jury of twelve. The court refused and the petitioner filed his petition for writ of mandamus to force the United States District Court to try this case before a jury of twelve.

Rule 83 of the Federal Rules of Civil Procedure provides in part as follows:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. * * *"

Rule 83 has been held many times to be a limitation on the power of the district court. See *Bogotay v. Montour R. Co.*, 177 F. Supp. 269 (D.C. Pa. 1959); *Cedolia v. C. S. Hill Saw Mills*, 41 F.R.D. 524 (D.C. N.C. 1967); *Dredge Corp. v. Penny*, 338 F.2d 456 (9th Cir. 1964); *First National Bank of Henrietta v. Small Business Administration*, 429 F.2d 280 (5th Cir. 1970).

The district courts have no power to rewrite the Federal Rules of Civil Procedure by passing a local rule. The courts have no right to rewrite the Federal Rules of Civil Procedure by judicial interpretation. This was recognized by this Court in *Harris v. Nelson*, 394 U.S. 286, 298, 22 L.Ed(2d) 281, 89 S.Ct. 1082, where the Court said:

> "We have no power to rewrite the rules by judicial interpretation."

Rule 48 of the Federal Rules of Civil Procedure provides that parties may stipulate to a jury of less than twelve.

According to the clear wording of Rule 48, only the parties may stipulate to a jury of less than twelve members; and, absent this stipulation, the jury must consist of twelve members. There is no ambiguity in Rule 48, and it was in full force and effect when the disputed local rule was adopted. Under Rule 1 of the Federal Rules of Civil Procedure, Rule 48 is binding on the United States district courts.

In *Fox v. United States*, 417 F.2d 84 (5th Cir. 1969), at

page 89, the Court says:

> "Unless otherwise stipulated, the verdict in a civil case must be the unanimous verdict of twelve jurors. Fed. R. Civ. P. 48."

To allow a federal district court without stipulation to designate a lesser number than twelve jury members in a civil case would grant the local courts the right to make a major change in the Rules of Civil Procedure, which, under 28 U.S.C., Section 2072, is the sole province of the United States Supreme Court with the concurrence of Congress.

Part of Rule 28, U.S.C., Section 2072, provides:

> "Such rules shall not take effect until they have been reported to Congress by the Chief Justice * * * and until the expiration of ninety days after they have been thus reported."

Prior to its repeal on November 6, 1966, 28 U.S.C. 2072, dealing with admiralty rules for the district court, had the same provision as the part of 28 U.S.C. 2072 quoted above.

We submit, in reasoning, *Miner v. Atlass*, 363 U.S. 641, 4 L.Ed.(2d) 1462, 80 S.Ct. 1300, is in point. The Court, in an admiralty case, held that a district court could not, by a local rule, allow a deposition for discovery purposes under Rule 26 of the Federal Rules of Civil Procedure. The Court, in that opinion, at page 363, U.S. 650, said:

> "The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, see 28 U.S.C., Sec. 331 (advisory function of Judicial Conference), 28 U.S.C., Sec. 2073 (Prior report of proposed rule to Congress), designed to insure that basic procedural innovations

> shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress as would now be required under 28 U.S.C., Sec. 2073."

One of the major purposes of the Federal Rules of Civil Procedure is to achieve uniformity throughout the federal system; this purpose is defeated if each local district court would be allowed to make its own rule regarding the size of juries. It would encourage forum shopping, create inconvenience for litigants and cause disproportionate case loads in some districts. *Hanna v. Plumer*, 380 U.S. 460, 14 L.ed(2d) 8, 85 S.Ct. 1136; 1B Moore's Federal Practice (2d), Section 0.512.

CONCLUSION

A civil jury in the federal courts has always been understood to be a jury of twelve persons. We believe that the founding fathers, in writing the Seventh Amendment, meant for the people to have a right to a common law jury of twelve.

Even if this Court should decide that the Seventh Amendment does not require a jury of twelve, the local district court does not have the right or power to violate the clear meaning of Rule 48 of the Federal Rules of Civil Procedure.

The plaintiff submits that the Court should now order the United States District Court for the District of Montana to try the

case of Roland V. Colgrove v. State Farm Mutual Automobile Insurance Company before a jury of twelve persons.

LLOYD J. SKEDD
1225 - 11th Avenue
Helena, Montana 59601

/s/ Lloyd J. Skedd

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, LLOYD J. SKEDD, attorney for the Petitioner herein, hereby certify that on this 21st day of November, 1972, I served the foregoing Brief for the Petitioner by depositing full, true and correct copies (3 copies to each) thereof, in the United States mail, Airmail, prepaid, addressed as follows:

Honorable James F. Battin
U. S. District Judge for Montana
Federal Building
Billings, Montana 59101

Mr. Cale Crowley
Crowley, Kilbourne, Haughey,
Hanson & Gallagher
Attorneys at Law
Electric Building, P.O. Box 2529
Billings, Montana 59101

Mr. Dale F. Galles
Harwood, Galles, Gunderson & Beiswanger
Attorneys at Law
Electric Building
Billings, Montana 59101
(attorneys for respondent)

Mr. L. Morris Ormseth
Jardine, Stephenson, Blewett & Weaver
Attorneys at Law
700 First National Bank Building
Great Falls, Montana 59403
(attorneys for State Farm
Automobile Insurance Company)

Solicitor General
Department of Justice
Washington, D. C. 20530

/s/ Lloyd J. Skedd

Subject Index

Page

Motion for Leave to File Amicus Curiae Brief 1

Amicus Curiae Brief of California Trial Lawyers Association in Support of Petitioner 5

Summary of Argument 5

Argument 6

I. The 12 member civil jury was established to ensure that community rather than individual standards will determine whether and when an individual will suffer loss of property or personal reputation without compensation 6

A. Civil jury reform should follow rather than precede a careful determination of the role and value of the civil jury in our legal system and of the comparative social cost of available alternatives to resolve the problems which have led to the instant alteration in the workings of the civil jury 6

B. The size of the common law civil jury was dictated by the need to ensure broad community representation to avoid the injustice which results from the verdicts of smaller bodies.... 10

C. The community nature of the 12 member civil jury is particularly central to its special function in setting legal standards with regard to what is defamatory and what constitutes due care 11

II. Reduction in the number of jurors defeats the primary function of civil juries, effects substantial differences in individual verdicts, and denies litigants the substance of their Seventh Amendment Right to a jury trial 14

A. The tasks performed by each juror are subtle, complex, and vulnerable to the exercise of personal bias and eccentricity 14

Page

B. Reduction in the size of civil juries results in different verdicts in a substantial percentage of cases since the jury becomes less representative of the community and its values; individual verdicts, as a consequence, are subject to greater deviations from community norms... 16

C. The reduction in the size of the civil jury by fifty percent effects a substantial change in its functions which denies petitioner the benefits of his rights secured by the Seventh Amendment 18

Conclusion 19

Table of Authorities Cited

Cases Pages

Baldwin v. New York, 399 U.S. 66 (1970) 7
Bloom v. Illinois, 391 U.S. 194 (1968) 7, 10, 11

Capital Traction Co. v. Hof, 174 U.S. 1 (1899) 8, 18
Colgrove v. Battin, 456 F.2d 1379 (9th Cir. 1972) 7, 8, 13
Cooley v. Strickland Transportation Co., 459 F.2d 779 (5th Cir. 1972) 7, 8, 12, 13

Dimick v. Schiedt, 293 U.S. 474 (1935) 9
Duncan v. Louisiana, 391 U.S. 145 (1968) 7, 11

Fried, *In re*, 161 F.2d 453 (2d Cir. 1947) 14

Galloway v. United States, 319 U.S. 372 (1943) 18
Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) 18, 19

Johnson v. Louisiana, 406 U.S. 356 (1972) 7

Peterson, *Ex parte*, 253 U.S. 300 (1920) 19

Railroad Company v. Stout, 17 Wall. 657 (1874) 12
Ross v. Bernhard, 396 U.S. 531 (1970) 18

Pages

Sparf and Hansen v. United States, 156 U.S. 51 (1895).... 12

Williams v. Florida, 399 U.S. 78 (1970) 6, 7, 8, 10, 11, 16, 17

Constitutions

United States Constitution:
Sixth Amendment 11
Seventh Amendment 2, 6, 7, 14, 18, 19, 20
Fourteenth Amendment 6

United States Code

28 U.S.C. Section 2072 ..... 7, 8

Books and Articles

Broeder, The Functions of the Jury: Facts or Fictions, 21 U. Chi. L. Rev. 386 (1954) 16, 18

Cronin, Six-Member Juries in District Courts, 2 Bost. B. J. No. 4, p. 27 (1958) 17

Devitt, The Six Man Jury in Federal Court, 53 F.R.D. 273 (1971) 7, 8

Devlin, Trial by Jury (1956) 11

Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, Juror Utilization in the United States Courts (1971) 10

Gibbons, The New Minijuries: Panacea or Pandora's Box?, 58 A.B.A.J. 594 (1972) 7

Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966) 10

Hogan, Some Thoughts on Juries in Civil Cases, 50 A.B.A.J. 752 (1964) 13

Holmes, The Common Law (1881) 11

James, Functions of Judge and Jury in Negligence Cases, 58 Yale L. J. 667 (1949) 12

Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055 (1964) 9, 10, 12, 13

Kalven & Zeisel, The American Jury (1966) 9, 14

Kessler, The Crime Crisis and Proposed Procedural Reform, 5 Loyola (of Los Angeles) L. Rev. 1 (1972) 8

Pages

New Jersey Experiments with Six-Man Jury, Bull. of the Section of Jud. Admin. of the A.B.A., May, 1966, p. 6 ..... 17, 18

Note, The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida, 22 Case West. L. Rev. 529 (1971) 16

Phillips, A Jury of Six in All Cases, 30 Conn. B. J. 354 (1956) 18

Sarpy, Civil Juries, Their Decline and Eventual Fall, 11 Loyola L. Rev. 243 (1963) 8

Scheflin, Jury Nullification: The Right To Say No, 45 So. Calif. L. Rev. 168 (1972) 12

Simon & Mahan, Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom, 5 Law & Soc. Rev. 319 (1971) 14

Six-Member Juries Tried in Massachusetts District Court, 42 J. Am. Jud. Soc. 136 (1958) 17

Tamm, The Five-Man Civil Jury: A Proposed Constitutional Amendment, 51 Geo. L. J. 120 (1962) 17

Thayer, The Jury and Its Development, 5 Harv. L. Rev. 249 (1892) 11

Van Dyke, The Jury as a Political Institution, 16 Cath. Lawyer 224 (1970) 12

Weinstein, Some Difficulties in Devising Rules for Determining Truth in Judicial Trials, 66 Colum. L. Rev. 223 (1966) 14, 15

Wells, The Origin of the Petty Jury, 27 Law Q. Rev. 347 (1911) 11

Wiehl, The Six Man Jury, 4 Gonzaga L. Rev. 35 (1968) ... 17

With Love in Their Hearts but Reform on Their Minds: How Trial Judges View the Civil Jury, 4 Colum. J. of L. & Social Prob. 178 (1968) 13

Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281 (1952) 13

Zeisel, And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710 (1971) 16

Zeisel & Callahan, Split Trials and Time Saving: A Statistical Analysis, 76 Harv. L. Rev. 1606 (1963) 9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1442

ROLAND V. COLGROVE, *Petitioner*,

vs.

HONORABLE JAMES F. BATTIN, United States District Judge for the District of Montana, Billings Division, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MOTION OF CALIFORNIA TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The undersigned move for leave to file the attached brief on behalf of the California Trial Lawyers Associ-

ation in support of Petitioner. In support of their motion, applicants state:

The undersigned constitute the Amicus Curiae Committee of the California Trial Lawyers Association, an organization of approximately 4,000 members, and file this motion on behalf of the Association.

The Association has a keen interest in this case because its purposes are to protect, preserve, and promote the rights of consumers and the public in the fields of consumer rights, environmental law, products liability, and personal injury in general, and to protect and preserve the jury system espoused by the Seventh Amendment in particular, a right which its members regard as the primary constitutional safeguard ensuring justice to all and protecting the public against abuse of highly concentrated economic power so typical of our present society.

Our study of the papers filed with this Court, and those heretofore filed below, has convinced us that certain matters have not been and are not likely to be presented to this Court by the parties which are of crucial importance for its consideration. For example, there has been little or no discussion of the role of civil juries, both as triers of fact and as definers of community standards in civil litigation, particularly in defamation and personal injury actions. Likewise, there has been little or no attention paid to the substantive implications in the reduction in size of civil juries by 50%. Nor has available empirical data been discussed by the parties.

Consent to the filing of the attached brief has been obtained from Petitioner; consent of Respondent was requested but refused.

Accordingly, we request leave to file the attached brief.

November 22, 1972.

Respectfully submitted,

ROBERT E. CARTWRIGHT
EDWARD I. POLLACK
THEODORE A. HORN
MARVIN E. LEWIS
WILLIAM H. LALLY
JOSEPH W. COTCHETT
HERBERT HAFIF
DAVID DAAR
LEONARD SACKS
SIEGFRIED HESSE
By SIEGFRIED HESSE
Attorneys for Amicus Curiae.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1442

ROLAND V. COLGROVE, *Petitioner*,

vs.

HONORABLE JAMES F. BATTIN, United States District Judge for the District of Montana, Billings Division, *Respondent*.

AMICUS CURIAE BRIEF OF CALIFORNIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

The nature of the interest of amicus curiae is stated in the attached motion (see above), and is incorporated herein.

SUMMARY OF THE ARGUMENT

I.

Any proposed reform in our centuries old civil jury system should be based on sound empirical data, and on an assessment of alternative means. The civil jury was established by our ancestors as a 12 member body to

ensure that it would be representative of community values and sentiments. That characteristic is crucial to the continued functioning of the civil jury since it must determine social norms in such cases as those of alleged defamation and negligence.

II.

The tasks of each individual juror are subject to the ready exercise of his personal bias and eccentricities. The civil jury can therefore not perform its function of determining community norms unless it is in fact broadly representative. The substantial reduction in size of the civil jury presented here results in different and more eccentric verdicts that deny petitioner the substance of his Seventh Amendment rights.

ARGUMENT

I. THE 12 MEMBER CIVIL JURY WAS ESTABLISHED TO ENSURE THAT COMMUNITY RATHER THAN INDIVIDUAL STANDARDS WILL DETERMINE WHETHER AND WHEN AN INDIVIDUAL WILL SUFFER LOSS OF PROPERTY OR PERSONAL REPUTATION WITHOUT COMPENSATION.

A. Civil jury reform should follow rather than precede a careful determination of the role and value of the civil jury in our legal system and of the comparative social cost of available alternatives to resolve the problems which have led to the instant alteration of the workings of the civil jury.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court concluded that the States are not required by the due process clause of the Fourteenth Amendment to provide for a 12 member jury in all criminal cases. The same day, however, the Court also assumed the continuation

of the 12 member federal criminal jury. See *Baldwin v. New York*, 399 U.S. 66, 72 (1970). See also *Bloom v. Illinois*, 391 U.S. 194, 213 (1968) (Fortas, J., concurring). Compare *Johnson v. Louisiana*, 406 U.S. 356, 369-77 (1972) (Powell, J., concurring); *Williams v. Florida*, *supra*, 399 U.S. at 122-29 (Harlan, J., dissenting). Moreover, in *Williams* this Court expressly reserved ruling on the requirements for civil juries under the Seventh Amendment. 399 U.S. at 92 n.30. But see *Duncan v. Louisiana*, 391 U.S. 145, 155, 157 (1968).

Nevertheless, *Williams* was promptly construed as having removed all constitutional barriers to the immediate reduction in size of federal civil juries. Devitt, *The Six Man Jury in Federal Court*, 53 F.R.D. 273 (1971). By April, 1972, at least 43 district courts had altered the composition of civil juries to less than 12 members in some or all civil cases. Gibbons, *The New Minijuries: Panacea or Pandora's Box?*, 58 A.B.A.J. 594, 597 (1972).

This anticipatory, if not precipitant, action was taken in face of the express mandate of 28 U.S.C. §2072 that the Federal Rules of Civil Procedure must "preserve the right of trial by jury [1] as at common law *and* [2] as declared by the Seventh Amendment to the Constitution" (emphasis added).

Neither the Ninth Circuit below, in *Colgrove v. Battin*, 456 F.2d 1379 (9th Cir. 1972), nor the Fifth Circuit, in *Cooley v. Strickland Transportation Co.*, 459 F.2d 779 (5th Cir. 1972), made any pretense of considering the relationship of the size of the common law civil jury to its assigned tasks in civil actions. Both rested their affirmance of the power of district courts to impose six

member juries on unwilling litigants on the anticipated overruling by this Court of such cases as *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899). They did so despite the fact that this Court made clear in *Williams* that changes, if any, should come from the legislative branch of government. 399 U.S. at 103.

The Ninth Circuit in *Colgrove* upheld the power of the *district court* to reduce civil juries to six members in face of 28 U.S.C. §2072 on the basis that Congress should not be understood to have prevented *this Court* from moving "in interstitial areas save in accordance with perhaps archaic common law procedures." 456 F.2d at 1380. The Fifth Circuit in *Cooley* explicitly imputed approval by this Court of the district court's action. 459 F.2d at 785.

There is no value to rehearse again the various arguments pro and con the role of civil juries. See *Cooley v. Strickland Transportation Co., supra*, 459 F.2d at 782-83 n.9, for many of the more recent commentaries. It would be obtuse, however, to ignore the current widespread concern about trial delay and the increasing cost of justice in our society. See, *e.g.*, Devitt, *supra*, 53 F.R.D. at 276-77. Nor should we be blind to the fact that the ultimate goal of some "reformers" is abolition of juries altogether. *E.g.*, Sarpy *Civil Juries, Their Decline and Eventual Fall*, 11 Loyola L. Rev. 243, 266 (1963); Kessler, *The Crime Crisis and Proposed Procedural Reform*, 5 Loyola (of Los Angeles) L. Rev. 1, 31-32 (1972) (advocating reduction in jury size as a "stopgap" measure).

Given the current climate of academic opinion, it is appropriate to recall that change is not necessarily synon-

ymous with reform, and that, with respect to Seventh Amendment rights, proposed curtailments "should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

The value of the role of the civil jury in our society must, indeed, be assessed apart from any need to reduce the volume of civil litigation concerning the automobile or to eliminate trial delay generally. The true social cost of civil juries cannot, in any event, be determined without also considering the comparative cost of other alternatives. Thus Professor Harry Kalven reports that an additional 1.6 judges would effect the same decrease in delay as would the elimination of all civil juries in New York City; that the same would be true of a reduction of two weeks in each judge's vacation; that split trials would be at least one-half as effective; and that New Jersey jury trials are already as speedy as New York trials would be without juries. Kalven, *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055, 1057-61 (1964). See also Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 Harv. L. Rev. 1606 (1963). In this connection it must be noted that the primary cost of juries in the federal system is not a function of their size, but of the lack of their effective use. For the fiscal year of 1971, 45.8% of the total cost of petit juries resulted from jurors who never served. The dollar cost of this waste was $6,369,000. That there is considerable room for reform is indicated by the fact that the rate of nonuse varied, from district to district, between the extremes of 17.9% to 78.7%. The estimated savings from the use of 6 member juries in all civil cases, in contrast,

would have been $1,799,600, or only 15% of the total petit jury cost. Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, *Juror Utilization in the United States Courts* pp. A-2, B-1, D-5 (August 13, 1971).

Delay per se, therefore, should not be considered "a sufficient reason for altering the jury apart from consideration of the quality of the jury as an adjudicator." Kalven, *supra*, 50 Va. L. Rev. at 1061. The jury has been retained despite the fact that "to some extent we sacrifice efficiency, expedition, and low cost." *Bloom v. Illinois, supra*, 391 U.S. at 209 (criminal case).

B. The size of the common law civil jury was dictated by the need to ensure broad community representation to avoid the injustice which results from the verdicts of smaller bodies.

The historical record is silent on the precise composition of the jury intended by the Seventh Amendment. It is nevertheless abundantly clear that the civil jury was highly prized by our Founders. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966).

In *Williams*, this Court concluded that the size of the common law jury was "a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" 399 U.S. at 102. After-the-fact explanations for the precise number of 12 jurors have indeed sometimes been mystical; and it may well have been accidental that 12 rather than 10 or 11 or 14 or 15 members were ultimately selected. But there is no basis in history to conclude that it was accidental that

the final choice was not four or six or eight, rather than 12. The ultimate choice was calculated to balance the need for broad community representation with the need for a functioning deliberative body. Wells, *The Origin of the Petty Jury*, 27 Law Q. Rev. 347, 356-57 (1911). Because of "its intrinsic fairness[, the jury came] . . . to be regarded as the one regular common-law mode of trial always to be had when no other was fixed." Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 249, 259 (1892). Indeed, jury trial became synonymous with "the common law of the land." *Ibid.* n.3. There is no mystery in the fact that "what was wanted was a number that was large enough to create a formidable body of opinion in favor of the side that won." Devlin, TRIAL BY JURY 8 (1958). Here, as elsewhere, the question was decided by our ancestors on the basis of practical experience. See Holmes, THE COMMON LAW 1 (1881).

C. The community nature of the 12 member civil jury is particularly central to its special function in setting legal standards with regard to what is defamatory and what constitutes due care.

Williams identified the essential function of the criminal jury secured by the Sixth Amendment to be protection of the accused from official oppression. 399 U.S. at 100; see also *Bloom v. Illinois, supra*, 391 U.S. at 202; *Duncan v. Louisiana, supra*, 391 U.S. at 156. Finding no such function for civil juries, the Fifth Circuit in *Cooley* concluded "it would be anomalous to the point of irrationality to construe the Constitution as sanctioning a six-member criminal jury but not sanctioning a six-member civil jury." 459 F.2d at 781.

The *Cooley* Court lost sight of a fundamental difference, however, in the accepted functions of criminal and civil juries. Criminal juries are not authorized to decide legal questions. *Sparf and Hansen v. United States,* 156 U.S. 51 (1895). But see Scheflin, *Jury Nullification: The Right To Say No,* 45 So. Calif. L. Rev. 168 (1972); Van Dyke, *The Jury as a Political Institution,* 16 Cath. Lawyer 224 (1970). Civil juries, in contrast, are not only authorized but required to define the social standards with respect to what is defamatory and what is due care. Kalven, *supra,* 50 Va. L. Rev. at 1071-72; James, *Functions of Judge and Jury in Negligence Cases,* 58 Yale L. J. 667, 676-79 (1949). As recognized by this Court almost a century ago, wholly apart from the fact determination

> . . . one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; those sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. . . .

Railroad Company v. Stout, 17 Wall. 657, 663-64 (1874). "Moreover, when it comes to a calculation of damages

. . . the estimate of what loss the plaintiff suffered can best be made by men who know different standards of working and living in our society." Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 Harv. L. Rev. 1281, 1287 (1952). Our civil jury, then is *the* expert tribunal "for the two great distinctive issues posed by the common law: drawing the profile of negligence and handling the individual pricing of damages." Kalven, *supra,* 50 Va. L. Rev. at 1058.

The civil jury can perform its assigned tasks, however, only if it is truly representative, for "one juror may be a tightfisted penny-pincher, [while] another freely spends money so long as it is not his own." Hogan, *Some Thoughts on Juries in Civil Cases,* 50 A.B.A.J. 752, 753 (1964). The outstanding virtue of the civil jury according to almost all trial judges surveyed by Professor Maurice Rosenberg was its representative character. *With Love in Their Hearts but Reform on Their Minds: How Trial Judges View the Civil Jury,* 4 Colum. J. of L. & Social Prob. 178, 185 (1968). (Of those surveyed, only 40% felt the jury should be reduced in size, and then only because of savings in time and costs. *Id.* at 192.)

It is not surprising, therefore, that both sides in *Colgrove* (456 F.2d at 1380) and in *Cooley* (459 F.2d at 780) objected to the reduction of the size of the jury from 12 to six members.

II. REDUCTION IN THE NUMBER OF JURORS DEFEATS THE PRIMARY FUNCTION OF CIVIL JURIES, EFFECTS SUBSTANTIAL DIFFERENCES IN INDIVIDUAL VERDICTS, AND DENIES LITIGANTS THE SUBSTANCE OF THEIR SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

A. The tasks performed by each juror are subtle, complex, and vulnerable to the exercise of personal bias and eccentricity.

The underlying premise of any trial is that reasonable men and women may differ in their perceptions of the disputed facts or in their conceptions of the basic issues at stake. Otherwise the parties could settle their differences without the aid of a neutral fact finder, whether it is a judge or jury. Moreover, if everyone evaluated evidence identically, there would be no need for more than a single fact finder; each additional individual's perceptions and conceptions would be cumulative rather than potentially disparate in nature. We know, however, that there is a wide spectrum in individual ability to perceive accurately, recall accurately, and evaluate rationally what has been remembered. Two-thirds of all criminal juries, for example, disagree on the first ballot. Kalven & Zeisel, THE AMERICAN JURY 487 (1966). While there is no readily available data for civil juries, a similar rate of disagreement seems likely since jurors, unlike judges, do not perceive a substantial difference in the burden of persuasion in criminal as compared to civil trials. Simon & Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 Law & Soc. Rev. 319 (1971).

Ultimately, the jury must decide the simple question: What happened? Its task is much like that of the historian. Weinstein, *Some Difficulties in Devising Rules for*

Determining Truth in Judicial Trials, 66 Colum. L. Rev. 223, 229 (1966); see also *In re Fried,* 161 F.2d 453, 462 n.21 (2d Cir. 1947). Unlike the historian, however, the jury must decide immediately, and without qualifications. Its verdict is the result of the collective integration of several levels of perception, memory and deliberation.

What happens in the courtroom, of course, is nothing remotely like the actual events which the jury is asked to reconstruct. The jurors must depend largely on the testimony of witnesses as to their memories of what they perceived in the past. Each juror, in short, must determine to his individual satisfaction: (1) How accurate was each witness' original perception? (2) How accurate is his present memory of that perception, if he is in fact attempting to tell the truth? and (3) How much weight should I give his testimony, given the probable nature of his original perception and his personal motivations when on the stand?

While in the juryroom, the jurors must in turn rely on their own perceptions of what transpired in the courtroom as well as their memories of those perceptions (perhaps days or weeks later). Finally, each juror must make sense of these different levels of perception and memory to participate meaningfully in the jury's deliberative process. At each stage of this complicated process (highly simplified here) each juror necessarily brings to bear his or her personal experiences, biases, and quirks.

The greater the number of jurors, therefore, consistent with a rational, deliberative process, the less influence will these individual threats to a just determination have

on the ultimate verdict. "One man cannot differ with his own judgment and any less than twelve men will reduce the probability of differences to be discussed. A fundamental tenet of the jury tradition, then, lies in its assumption that controverted factual issues are best resolved through reasoned discussion and debate." Broeder, *The Functions of the Jury: Facts or Fictions*, 21 U. Chi. L. Rev. 386, 388 (1954).

B. Reduction in the size of civil juries results in different verdicts in a substantial percentage of cases since the jury becomes less representative of the community and its values; individual verdicts, as a consequence, are subject to greater deviations from community norms.

No individual 12 member jury can be expected to be fully representative of all competing community values. *Williams v. Florida, supra,* 399 U.S. at 102. It does not follow from that fact, however, that a six member jury can represent community values equally well. A six member criminal jury will convict and acquit different defendants. Zeisel, *And Then There Were None: The Diminution of The Federal Jury,* 38 U. Chi. L. Rev. 710, 721 (1971); Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida,* 22 Case West. L. Rev. 529 (1971).

Similar results follow from the reduction in size of civil juries. A 10 percent minority in the community, for example, will be represented (before challenge) on 72 of every 100 twelve member juries, but on only 47 of every 100 six member juries. Zeisel, *supra,* 38 U. Chi. L. Rev. at 716. Moreover, a six member jury will reflect a standard deviation from community norms which is 42%

greater than that of a 12 member jury. *Id.* at 717-18. Stated another way, six member juries will inevitably render far more eccentric verdicts than will 12 member juries.

This Court concluded in *Williams* that the reduction of criminal juries from 12 to six members should not affect its function to protect an accused from governmental oppression. 399 U.S. at 100-01. In reaching this conclusion, however, it relied only on a "few experiments . . . in the civil area." *Id.* at 101-02.

Of the six sources cited (399 U.S. at 101 n.48), two rely essentially on the lack of evidence that six member juries will not function as well as 12 member juries. Wiehl, *The Six Man Jury,* 4 Gonzaga L. Rev. 35, 39 (1968); Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment,* 51 Geo. L. J. 120, 129 (1962). These authors merely shifted the constitutional burden of proof to those advocating retention of juries as constituted for centuries. Two other reports concern the same Massachusetts experiment in which the actual choice presented was between a speedy determination by a six member jury or a long delayed determination by a 12 member jury. Cronin, *Six-Member Juries in District Courts,* 2 Bost. B. J. No. 4, p. 27, at 29 (1958); see also *Six-Member Juries Tried in Massachusetts District Court,* 42 J. Am. Jud. Soc. 136 (1958). This choice, of course, presents quite different issues than are faced here. The fifth source reported on what was apparently a single trial, which is hardly evidence for anything other than the fact that it happened. *New Jersey Experiments with Six-Man Jury,* Bull. of the Section of Jud. Admin. of

the ABA, May, 1966, at p. 6. The final source is itself evidence that experienced attorneys prefer 12 member juries to six member juries, even when their clients are required to pay for them. Phillips, *A Jury of Six in all Cases*, 30 Conn. B. J. 354, 355 (1956). In none of these materials is anything reported beyond individual impressions and opinions. They merely illustrate the fact that "in the absence of empirical data [concerning juries], value judgments all too readily creep in to substitute for facts." Broeder, *supra*, 21 U. Chi. L. Rev. at 424.

C. The reduction in the size of the civil jury by fifty percent effects a substantial change in its functions which denies petitioner the benefits of his rights secured by the Seventh Amendment.

The Seventh Amendment guarantees a jury trial in civil actions for damages, defamation, and recovery of property. *Ross v. Bernhard*, 396 U.S. 531, 533 (1970). Central to that right, as this Court has long held, is the determination of 12 members chosen from and representative of the community and its values. *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

As demonstrated immediately above, the reduction in the size of the civil jury frustrates its constitutional function because the jury becomes less representative and subjects litigants to more verdicts which are not in accord with community norms. The function of jury size, therefore, cannot be considered merely a matter of procedure or form which is not essential to the purposes of the Seventh Amendment. Compare, *e.g.*, *Galloway v. United States*, 319 U.S. 372 (1943) (directed verdict); *Gasoline*

Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) (new trial on issue of damages alone); *Ex parte Peterson*, 253 U.S. 300 (1920) (appointment of auditor).

Civil juries do not merely determine facts; they also resolve social issues. Reduction in the size of the civil jury by 50% in the instant case denies petitioner his constitutional rights pursuant to the Seventh Amendment.

CONCLUSION

If change in the size of civil juries is to be effected in light of modern conditions, its size should be increased rather than reduced to preserve its representative character. When juries were initially established as 12 member bodies in England, and when the common law right to a civil jury was secured by our Founders by the Seventh Amendment, the communities from which juries were drawn were geographically stable, socially immobile, and low in density. Today they are drawn from communities which are characteristically mobile, incredibly diverse in experience, and of densities which are rapidly approaching the intolerable.

It is ironic that critics of the 12 member civil jury rely on the very conditions which have already substantially diluted the civil jury's representative character as justification for its further dilution, if not outright abolition. Thus viewed, the urban crisis becomes a constitutional crisis. Measured by the purposes of the Seventh Amendment, there is little difference between the bisection or abolition of the civil jury. Either so-called reform

effectively destroys the civil jury's constitutional purpose and denies civil litigants their Seventh Amendment rights.

November 22, 1972.

Respectfully submitted,

ROBERT E. CARTWRIGHT
EDWARD I. POLLACK
THEODORE A. HORN
MARVIN E. LEWIS
WILLIAM H. LALLY
JOSEPH W. COTCHETT
HERBERT HAFIF
DAVID DAAR
LEONARD SACKS
SIEGFRIED HESSE
By SIEGFRIED HESSE
Attorneys for Amicus Curiae.

FILED
NOV 28 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1442

ROLAND V. COLGROVE

Petitioner,

vs.

HONORABLE JAMES F. BATTIN
U.S. District Judge for the District of Montana

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

Brief for the National Emergency Civil Liberties Committee Amicus Curiae

LEONARD BOUDIN
NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE
25 East 26 Street
New York, N.Y. 10010

ALAN SCHEFLIN
699 Rhode Island Street
San Francisco, Cal. 94107

JON VAN DYKE
Hastings College of the Law
198 McAllister Street
San Francisco, Cal. 94102

BORS PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX

	Page
Table of Authorities	i
Notice of Motion for Leave to File	1
Question Presented	2
Statement of the Case	3
Argument	3
I. The Context Within Which This Case Is Brought Before the Court	5
II. The Seventh Amendment Requires That Civil Juries Continue to Be Composed of Twelve Persons	7
III. *Williams v. Florida* Is Not Dispositive of This Case	10
IV. *Williams v. Florida* Was Based on the Incorrect Premise That Six-Person Juries Function in the Same Manner as Do Twelve-Person Juries	14
V. The Twelve-Person Jury Must Be Retained If We Are to Retain Our Democratic Values	19

TABLE OF AUTHORITIES

Cases	Pages
Apodaca v. Oregon, 406 U.S. 404 (1972)	11, 13, 14
Byrne v. Matczak, 254 F.2d 525 (3 Cir. 1958), cert. denied 358 U.S. 816	9
Capital Traction Company v. Hof, 174 U.S. 1 (1899)	3, 4, 8, 11, 12
Colgrove v. Battin, 456 F.2d 1379 (9 Cir. 1972)	11
Cooley v. Strickland Transportation Company, 459 F.2d 779 (5 Cir. 1972)	5, 12, 13
Fox v. United States, 417 F.2d 84 (5 Cir. 1969)	9, 10
Galloway v. United States, 319 U.S. 372 (1943)	8, 9, 19
In re Peterson, 253 U.S. 300 (1920)	8
Jacob v. New York, 315 U.S. 752 (1942)	19
Parsons v. Bedford, Breedlove & Robeson, 3 Pet. (28 U.S.) 433, (1830)	7
Ross v. Bernard, 396 U.S. 531 (1970)	9
Williams v. Florida, 399 U.S. 78 (1970)	4, 10, 11, 13, 14, 15, 18

Constitutional Provisions	
First Amendment	2
Fifth Amendment	2
Sixth Amendment	13
Seventh Amendment	2, 7, 8, 9, 10, 11, 12, 14, 19
Fourteenth Amendment	2, 14

Other Authorities

	Pages
Chesterton, Tremendous Trifles (1920)	21
Comment, *Florida's Six-Member Criminal Juries: Constitutional, But Are They Fair?* 23 U.Fla.L. Rev. 402 (1971)	18
Henderson, *The Background of the Seventh Amendment*, 80 Harv.L.Rev. 289 (1966)	7
Juror Utilization in United States Courts (Administrative Office of the U.S., August 13, 1971)	6
Kalven, *The Dignity of the Civil Jury*, 50 Va.L.Rev. 1055 (1964)	7
Kessler, *The Crime Crisis and Proposed Procedural Reform*, 5 Loyola of L.A.L.Rev. 1 (1972)	20
Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 Case Western Res.L.Rev. 529 (1971)	18
Scheflin, *Jury Nullification: The Right To Say No*, 45 S.Cal.L.Rev. 168 (1972)	20
Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U.Chi.L.Rev. 710 (1971)	16

Rules

Federal Rules of Civil Procedure:	
Rule 83	12, 13
Revised Rules of Procedure for the United States District Court:	
Rule 13(d)(1)	3
Rules of the Supreme Court of the United States:	
Rule 42(3)	1

Statutes

28 U.S.C. 1414(b)	3
42 U.S.C. § 1983	6

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1442

ROLAND V. COLGROVE

Petitioner,

vs.

HONORABLE JAMES F. BATTIN
U.S. District Judge for the District of Montana

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

---

Brief for the National Emergency Civil Liberties Committee Amicus Curiae

---

NOTICE OF MOTION FOR LEAVE TO FILE

This is a motion of the National Emergency Civil Liberties Committee for leave to file a brief *amicus curiae.*

The National Emergency Civil Liberties Committee respectively moves for leave to file a brief as *amicus curiae* pursuant to rule 42(3) of this Court. We have not formally requested permission from the parties to this action, because we learned from counsel for the California Trial Lawyers Association—who is also requesting permission for leave

to file a brief *amicus curiae*—that permission was denied by the respondents. We were unable to file this brief within the time allotted to petitioners for filing their opening brief because our chief counsel, Leonard Boudin, was unexpectedly called back to work on the case of Daniel Ellsberg in Los Angeles, and his partner, Victor Rabinowitz, has been stricken with hepatitis. We pray that the Court will accept this brief under its rule 42(3) as timely filed, despite the several-day delay.

The interest of the National Emergency Civil Liberties Committee is prompted by the nature of our organization which is an unincorporated association organized for the purpose of protecting and defending the civil liberties and civil rights of the people of the United States. The association is particularly concerned with the rights of the people guaranteed by the First, Fifth, Sixth, Seventh, and Fourteenth Amendments of the United States Constitution and has from time to time filed briefs *amicus curiae* in this and in other courts in cases involving substantial civil liberties questions. The interest of *amicus* herein arises from the critical bearing this case has on a cardinal constitutional principle: that twelve members are an essential feature of the jury system.

The question is a complex one and we believe the brief of this association will be of assistance to the Court.

QUESTION PRESENTED

Does the guarantee in the Seventh Amendment of the United States Constitution that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." permit the use of juries composed of fewer than 12 persons in federal civil trials?

STATEMENT OF THE CASE

Petitioner brought an action for libel in the U.S. District Court for the District of Montana. Jurisdiction of the case was invoked under 28 U.S.C. 1414(b). Pursuant to rule 43(d)(1) of the Revised Rules of Procedure for the U.S. District Court, which became effective on September 1, 1971, this matter was set for trial before a jury consisting of six persons. Plaintiff moved to try the matter before a jury of 12 persons, but this motion was denied. Subsequently, the petitioner sought a writ of mandamus from the U.S. Circuit Court of Appeals for the Ninth Circuit, but this was denied on March 6, 1972.

ARGUMENT

The historically validated twelve-member federal civil jury has recently been displaced in thirty-two federal districts by local rules which reduce the size of the jury to six-members. The reasons given for this change in jury structure are greater efficiency and lower operating cost. But either of these reasons is sufficient to overcome the strong intention of the Seventh Amendment to preserve the substance of the civil jury as it was understood by the Founding Fathers. In addition, the time and the costs saved are minimal, especially in the context of weakening the dignity of the civil jury.

The Seventh Amendment, both in historical context and current interpretation, mandates a twelve-member federal civil jury. While new procedural reforms are permissible to expedite trials and improve the quality of evidentiary rules, no basic tampering with the substance of the jury itself is allowable. In *Capital Traction Company v. Hof*, 174 U.S. 1 (1899), the Seventh Amendment was interpreted to require twelve-member juries. That decision is controlling

and cannot be overruled by the actions of thirty-two district courts and two courts of appeal. Only the Supreme Court can reverse its own decisions. But *Capital Traction* is sound law and should be re-affirmed.

In *Williams v. Florida*, 399 U.S. 78 (1970), a six-member jury in a state criminal trial was sustained against constitutional attack on Sixth Amendment grounds. But principles of federalism allow jury reform on the state level while forbidding such changes on the federal level. In *Williams* this Court specifically left open the issue in the instant case and *Williams* is therefore not dispositive of the question of whether the Seventh Amendment permits a six-member federal civil jury. In addition, *Williams v. Florida* was based upon the premise that there would be no significant difference in the performance of the six-member and twelve-member juries. But this premise is inaccurate since proof is available that the six-member jury will function in an entirely different way, and thereby reach different verdicts than, a twelve-member jury. The six-member jury will violate principles of drawing juries from representative cross-sections of the community and this jury will less accurately reflect the consensus of the community than will the twelve-member jury.

The jury has traditionally been a pillar of democracy and a means by which lay persons become a functioning part of government. Arguments of economic efficiency are not strong enough to risk the weakening of our democratic principles entailed in curtailing the full breadth of the jury system. The threat of the total abolition of the jury, now being argued in many circles, requires that the democratic nature of the jury system, as the essence of our constitutional form of government, be once again re-affirmed in clear terms. To protect our basic freedoms the jury structure as it is now constituted must be upheld.

I. THE CONTEXT WITHIN WHICH THIS CASE IS BROUGHT BEFORE THE COURT.

The present case is not an isolated matter brought before this Court from the distant plains of Montana. Rather it is the vehicle by which an issue of great importance affecting the entire country is to be decided. During the past two years there has been a movement in the federal courts and in some of the state courts to reduce the size of civil juries. According to an appendix published at the end of *Cooley v. Strickland Transportation Company*, 459 F.2d 779, 786 (1972), 32 of the 90 federal district courts have adopted a policy of reducing the size of civil juries with regard to at least some kinds of litigation. These reductions are explained on grounds of efficiency and because of a view that civil juries are of less importance and dignity than criminal juries. Before addressing the legal and policy issues involved these preliminary matters must be considered.

The efficiency argument involves both the length of trials and their costs. Reduction in the size of the jury, it is contended, will result in speedier trials and less cost to the taxpayers. Even if both of these contentions are true, the savings are relatively minimal. Jury selection, under a system in which the judge conducts the voir dire, speaking generally to the entire panel and only occasionally to individual jurors, is not significantly different if 12 jurors are to be selected or if six are to be selected. In both instances, the judge must describe the case and ask the jurors general questions about bias. The process of challenge will be lengthened a bit, but hardly more than a few minutes in the normal trial. During the conduct of the trial, the size of the jury will make absolutely no difference in the time required, and then during deliberation a 12-person jury might take a bit longer but only if there are issues that require discussion. While the jury is deliberating the judge

is free to conduct other business; the size of the jury is then irrelevant at this stage. It seems improper in any event to try to exact time saving at the expense of a full and frank discussion of the complex issues to be decided.

The monetary expense involved in paying fewer jurors is again not of great significance and should not carry substantial weight where constitutional rights are involved. A recent report of the Administrative Office of the United States Courts estimates that if *every* district court reduces the size of its juries to six for *every* civil case, the saving would be only $1,799,600, a figure that is only about 1.5 percent of the federal judicial budget and an infinitesimal fraction of the entire U.S. budget *JUROR UTILIZATION IN UNITED STATES COURTS* (Aug. 13, 1971). We are thus talking about nickel and dime savings at the expense of a right that Anglo-Saxons have fought for over the course of several centuries.

The argument that juries in civil cases are somehow less important than in criminal cases is also an inappropriate argument in this context. Certainly the writers of the Bill of Rights did not agree with this distinction, because they made special provisions to protect both the right to trial by jury in civil cases and the right to trial by jury in criminal cases. The right to a trial by a jury of peers is just as crucial in the civil setting as it is in the criminal context. One need only think of the issues raised in cases brought under 42 U.S.C. sec. 1983 to realize the importance of having fellow-citizens passing judgment on the controversies. And in libel cases, such as the one presently under consideration, the need for a body of lay persons has always been recognized to protect both the crusading journalists who may speak harshly of the government and also the powerless citizen slandered by the powerful organs of the press and the airwaves. The issues involved in these

cases are too crucial to allow them to be taken from a panel that is truly representative of the citizenry. See Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964).

II. THE SEVENTH AMENDMENT REQUIRES THAT CIVIL JURIES CONTINUE TO BE COMPOSED OF TWELVE PERSONS.

The historical background still extant of the Seventh Amendment is unfortunately meager. What little documentation we possess describing the genesis of this amendment does indicate quite clearly, however, that the Seventh Amendment was added to the Bill of Rights because of the strong pressure levied by the anti-federalists who feared that the civil jury would ultimately be abolished unless protected in straight-forward language. It was to preserve the civil jury as it was then understood that a separate amendment was added to the Bill of Rights providing explicitly that the right to trial by jury at common law shall not be denied to any litigant. See Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966). "One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases." *Parsons v. Bedford, Breedlove & Robeson*, 3 Pet. (28 U.S.) 433, 446.

Although the Seventh Amendment appears clearly to preserve the common law jury in all cases where such a jury trial was permitted in 1791, some confusion has arisen over the interpretation of this provision. Legislative history indicates that the Federalists resisted its inclusion in the Bill of Rights because of the great difficulty of finding appropriate wording to cover the different civil jury trial procedures of the states. Since there was no federal practice to draw on, and since state practices varied so widely, any language that would satisfy adherents of the jury

would necessarily be general. As a result, the Seventh Amendment was not intended to describe definitively all facets of jury practice, but rather was intended to emphasize the grave importance attached to the civil jury as it was then understood. While evidentiary practice differed in equity which were not, it is clear that by "jury" the dividing line between cases at law tried by jury and suits in equity which were not, it is clear, that by "jury" the understanding in all states was a twelve-member lay panel having exclusive right to determine the facts at issue. Cutting the size of the jury in half, especially for reasons of efficiency and economy, constitutes precisely the sort of threat to the institution of the civil jury that led to the inclusion of the Seventh Amendment in the first place.

The Supreme Court has consistently recognized that the Seventh Amendment mandates a jury of twelve. In *Capital Traction Company v. Hof*, 174 U.S. 1 (1899), the Court stated that "trial by jury is a trial by a jury of twelve men . . ." *Id.* at 13-14. For 73 years this has been the controlling interpretation of the Seventh Amendment until reversed by two United States Courts of Appeal this year.

Constitutional interpretation of the Seventh Amendment in this century has of course recognized that certain procedural changes could be made. The rules of evidence, the procedures for expediting trials, and the methods for determining what facts are actually at issue can all be changed, in just the same manner that in 1791 each state was allowed to have its own rules on these subjects. *In re Peterson*, 253 U.S. 300 (1920); *Galloway v. United States*, 319 U.S. 372 (1943). But the basic structure of the civil jury on which all states agreed in 1791 cannot be changed if the Seventh Amendment is to have any continuing meaning.

Extensive research has not produced one citation involving tampering with the basic structure of the jury. All of the decisions of this Court authoritatively explicating the meaning of the jury trial guarantee in civil cases have dealt either with whether an issue was originally at law or in equity, *Ross v. Bernard*, 396 U.S. 531 (1970), or with the division of function between the judge and the jury, with particular reference to directed verdicts and jury instructions. *Galloway v. United States, supra.* No case ever brought to the Supreme Court on a Seventh Amendment basis involved a revamping of the nature of the jury itself. And no case in the lower federal courts has allowed the basic understanding of the jury to be altered.

In two cases, decided by U.S. Courts of Appeal, a Seventh Amendment argument was directed at the jury itself. In *Byrne v. Matczak*, 254 F.2d 525 (3 Cir. 1958) cert. den. 358 U.S. 816, the presiding judge in a civil trial allowed the jurors in the midst of deliberation to return to their homes for the evening. The jury had deliberated for over six hours and when they returned in the morning they were asked whether they obeyed the judge's instructions not to discuss the case with anyone while they were home. The jury deliberated for another seven hours before reaching its decision. No prejudice was shown in allowing the jury to retire to their homes and no objection was made at the time. Under these circumstances, although this practice was impermissible at common law, it was upheld as not violative of the Seventh Amendment. It is clear that this case did not involve a question of what constitutes a jury and would not have increased the anti-federalist fear of abolition of the civil jury, which provided the basis for the inclusion of the Seventh Amendment.

In *Fox v. United States*, 417 F.2d 84 (5 Cir. 1969), one juror remained silent while the jury was being polled after its verdict. The jury was dismissed but an affidavit was

later filed detailing the fact that this one juror never agreed to the verdict. The trial judge held that the verdict could not be impeached but the Fifth Circuit reversed holding that a verdict means the unanimous consent of twelve jurors. It is submitted that *Fox* is both rightly decided and relevant to the issue in the present case. In *Fox* there was a basic change in the concept of the jury: eleven out of the twelve jurors reported a verdict representing it as the decision of the jury. They did so not realizing that unanimity was required but their act was nevertheless a substantial alteration of the meaning of the jury as it was understood both at common law and at present. The basic alteration in the concept of the jury that was entailed was correctly found to violate the Seventh Amendment. It is just such an alteration in the basic understanding and purpose of the jury that we confront in this case. We learn from the Seventh Amendment's background that the proper question to ask is: does the jury reform represented here constitute a threat to the existence and central importance of the civil jury? Or, put in its historical context, if the jury reform proposed here were presented to the anti-federalists at the time of the Constitutional Convention would they have accepted it or would they have viewed it as an attack on the integrity of the civil jury? We believe that the attempt to slice the jury in half in all cases is a threat to the viability of the civil jury and a way station on the road to its ultimate demise for artificial reasons of economy. We further believe that the anti-federalists would have preceived it in precisely the same way.

III. WILLIAMS v. FLORIDA IS NOT DISPOSITIVE OF THIS CASE.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court upheld the constitutionality of a Florida statute authorizing six-member juries in criminal cases. Despite sweeping

language in the majority opinion, this case did not decide whether federal criminal practice would constitutionally permit less than twelve-member panels, nor did it decide whether civil federal practice, under the Seventh Amendment, would support six-member juries. Thus *Williams* was a state criminal case under the Sixth and Fourteenth Amendments whereas this case is a federal civil case under the Seventh Amendment. Despite these obvious differences, two federal Courts of Appeal made the leap of faith and applied *Williams* to federal civil practice, thus reversing a Supreme Court decision (*Capital Traction Company v. Hof*, 174 U.S. 1 (1899)) which has been good law unchallenged for 73 years.

The Ninth Circuit in the instant case recognized that the majority opinion reserved the question whether the *Williams* result would also apply under Seventh Amendment analysis. In *Williams* the Court specifically noted that "we do not decide whether . . . additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation." 399 U.S. at 92, fn. 30. Nevertheless, the Ninth Circuit held that the reasons for deciding *Williams* apply with "equal force" to this case. The Court further concluded that the references to the common law in the Seventh Amendment do not purport to "define the jury or trial by jury in terms of the common law." 456 F.2d at 1380. With all due respect it appears that the Ninth Circuit has missed the essential fact of *Williams*: that principles of federalism may give the states some leeway to experiment with criminal justice systems without being bound to federal practice in all particulars. This facet of *Williams*, strongly emphasized in Mr. Justice Harlan's concurring opinion and echoed in Mr. Justice Powell's concurring opinion in *Apodaca v. Oregon*, 406 U.S. 404, 366 (1972), still leaves open the question of whether federal

practice can substantially curtail the common law concept of the civil jury. At present, the answer is supplied by *Capital Traction:* the Seventh Amendment means a twelve-member jury. We are frankly not aware of any principle authorizing a United States Court of Appeals to reverse a clear holding of the United States Supreme Court on the assumption that the Court has decided an issue which it stated it clearly reserved.

In *Cooley v. Strickland Transportation Company,* 459 F.2d 779 (5th Cir. 1972), further light is shed on the process by which a lower court overrules a higher one. Federal Rule of Civil Procedure 83 requires that any change in district court rules be furnished to the Supreme Court. The Fifth Circuit states that "We interpret the Supreme Court's receipt of the local rule without objection as indicating tacit approval of the rule. As a subordinate federal court, we are reluctant to overturn a local rule to which the Supreme Court has not objected." 459 F.2d at 785. It should be noted that Rule 83 merely directs district courts to send copies of changes in procedures to the Supreme Court, it does not require the Court to approve them or in any way respond to them. As was pointed out in Judge Coleman's dissenting opinion, the Supreme Court does not render advisory opinions and in the absence of a case or controversy, the Supreme Court does not speak. Even further, the Supreme Court does not render advisory opinions by silence. 459 F.2d at 790. Since *Capital Traction* is still good law, the Fifth Circuit must have concluded that the Supreme Court tacitly overruled a 73-year old case, which constitutes the definitive treatment of the issue in controversy, by remaining silent. If this view were to be accepted, any precedent of the Supreme Court could be reversed by a lower

federal district court simply by sending a written message to the Supreme Court pursuant to Rule 83 of the Federal Rules of Civil Procedure and waiting for no response. The Supreme Court has a heavy enough caseload without having to decide cases *sub silentio*. The dangerous practice approved of by the Fifth Circuit must be emphatically rejected.

Cooley also makes the leap of faith from *Williams* to the federal civil jury. It does so by noting that it "would be anomalous to the point of irrationality to construe the Constitution as sanctioning a six-member criminal jury but not sanctioning a six-member civil jury." 459 F.2d at 781. But it is not irrational to recognize that the Constitution may have sanctioned a *federal* twelve-member jury in both civil and criminal cases but permitted a *state* to modify the jury to allow for six-member juries. The court in *Cooley* recognized the fact that *Williams* involved a state court jury but concluded that the theory that the Bill of Rights should be applied to the states through the Due Process Clause of the Fourteenth Amendment in a "watered down" version has not prevailed. Rather, the incorporationalist view which unifies state and federal practice is the current correct interpretation of matters of constitutional federalism. But this is precisely the issue at stake. Since *Williams* did not reach the question of federal practice, we do not know whether the full Court would apply the incorporationalist view or not. Some evidence of the Court's thinking can be gleaned from the most recent jury case decided by the Court. *Apodaca v. Oregon*, 406 U.S. 404 (1972). At issue in this case was the Sixth Amendment guarantee of right to trial by jury and the question of whether the states could constitutionally accept less-than-unanimous verdicts in criminal trials. Four justices held that unanimity was not constitutionally required in state criminal jury verdicts,

four justices held that it was, and Justice Powell cast the swing vote in favor of allowing the states some elbow room to experiment. Justice Powell clearly rejects the major premise of the majority opinion which he sees as being "that the concept of the jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment." Echoing Justice Harlan's concurring opinion in *Williams*, Justice Powell goes on to state that "the process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to, the limitations on that right as it was known in criminal trials at common law." *Id.* at fn. 6. It seems reasonable to conclude, therefore, that since the Court has not faced directly the question of federal jury practice, and since the Court is obviously divided over proper construction of the concept of "jury", and since the personnel on the Court differs from the Court which decided *Williams*, it is not possible at this time to predict just what result the Court will reach in construing the Seventh Amendment guarantee of trial by jury in federal civil cases. The Fifth Circuit, in avoiding any reference to *Apodaca*, fails to comprehend the important difference between *Williams* and the Seventh Amendment challenge in federal civil cases.

IV. WILLIAMS v. FLORIDA WAS BASED ON THE INCORRECT PREMISE THAT SIX-PERSON JURIES FUNCTION IN THE SAME MANNER AS TWELVE-PERSON JURIES.

The majority opinion in *Williams* regarded the requirement of twelve jurors as an "historical accident" with significance only to "mystics." 399 U.S. at 102. According to the Court there is no magic in the number 12 and, viewing the jury in terms of its function and purpose, the requirement that the jury consist of twelve persons is not consti-

tutionally mandated. But then the question becomes one of determining what size a jury must be in order to still function in its historic role. The majority opinion responds that the "number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." 399 U.S. at 100. In important language the Court then asserted what must assuredly be the lynchpin of its decision: "the reliability of the jury as a factfinder hardly seems likely to be a function of its size." 399 U.S. 100-101. Even further, Justice White asserted that he was confident that there would be "no discernible differences between the results reached by the two different-sized juries." 399 U.S. at 101. With regard to the requirement that the jury be a representative cross section of the community, Justice White concluded:

> As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, . . . the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one. (399 U.S. at 102.)

Obviously then the *Williams* case has as its major premise the fact, empirically verifiable or refutable, that six-member juries will not exclude significant community viewpoints that would be heard if the twelve-member jury were retained. In this regard, we observe that the Constitution does not allow the states to decrease the quality of justice to which a litigant or defendant is entitled. Rather, under principles of federalism the states are free to experiment with different methods to achieve the same goals and to protect zealously the same liberties. If in fact the state experiment fails—if a poorer quality justice is delivered—then the Constitution would forbid the practice from continuing. In the *Williams* case the issue was the six-member

state criminal jury. The Court allowed the states the opportunity to use smaller juries because the Court did not believe that a poorer quality of justice would result. If in fact empirical data becomes available showing that the constitutional guarantee of a representative jury cannot be met, or is seriously diluted, by the decreased jury size, then the Constitution must forbid the reduced jury size.

Professor Hans Zeisel, one of the foremost authorities on the American jury system, has recently demonstrated that a significant difference *does* exist between the six-member and the twelve-member jury and this difference contradicts Justice White's assumptions on the relative performance of both juries. Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U.CHICAGO L.REV. 710 (1971). Professor Zeisel reviews the articles cited by Justice White to support his view that no significant difference exists between the operation of the six- and twelve-member juries, and shows that only the flimsiest of evidence supports that view. Most of the articles cited by Justice White were not even based on data at all but rather on the opinions of judges and clerks. Professor Zeisel then proceeds to demonstrate that the six-member jury functions quite differently from its historically legitimated counterpart.

The heart of the jury concept is the fact that each juror comes to the case with different perceptions and viewpoints. If we all saw the same there would be no reason for a jury. The constitutional mandate that juries be drawn from a representative cross-section of the community recognizes this fact. Suppose that in a given community, 90% of the people share one viewpoint and the remaining 10% have a different viewpoint. Suppose further that we draw 100 twelve-member and 100 six-member juries. According to Professor Zeisel, approximately 72 of the twelve-member juries would

contain a representation of the 10% minority as compared to only 47 juries composed of six persons. *Id.*, at 716. This is by no means a "negligible" difference.

Professor Zeisel also demonstrates that this same disparity of performance occurs in civil juries: the proof is a bit more complex, but worth reproducing here because of the importance of the demonstration. Suppose, says Professor Zeisel, that for a given injury one-sixth of the community's population would award the victim $1,000, another one-sixth would give him $2,000, a third one-sixth would award him $3,000, a fourth one-sixth would award him $4,000, a fifth one-sixth would value the injury at $5,000, and the final one-sixth would place a value of $6,000 on the injury. The community's average valuation would therefore be $3,500. Our goal should be to build a jury system in which the jury will serve as a microcosm for the community from which it is drawn and in which most juries would give the victim about $3,500. If 100 12-person and 100 six-person juries were assembled and given the case just discussed they would render awards fluctuating in a pattern as listed in the following chart:

PERCENT DISTRIBUTION OF THE AVERAGE EVALUATION BY 100 RANDOMLY SELECTED JURIES

Interval	Twelve-member	Six-member
$1,000-1,499	—	0.1
$1,500-1,999	0.1	1.4
$2,000-2,499	2.0	6.4
$2,500-2,999	13.7	16.4
$3,000-3,499	34.2	25.7
$3,500-3,999	34.2	25.7
$4,000-4,499	13.7	16.4
$4,500-4,999	2.0	6.4
$5,000-5,499	0.1	1.4
$5,500-6,000	—	0.1
Totals	100.0	100.0

Id., at 717

According to these figures, 68.4 percent of the verdicts of 12-person juries will fall between $3,000 and $4,000, approximating the community's consensus. If six-person juries are used, however, only 51.4 percent of the verdicts will fall within that desired range. In addition, if six-person juries are used 15.8 percent of the verdicts will fall below $2,500 or above $4,500, results that greatly distort the community's consensus on this question; if 12-person juries are used only 4.2 percent of the verdicts will fall in these outer limits. It seems clear from this demonstration that the selection of the size of juries at the number 12 was not just the result of a mystical incantation. When 12 persons deliberate together the chances that their verdict will accurately reflect the community's view on the question at hand are significantly higher than if it is a smaller group that is deliberating. Professor Zeisel concludes that if fewer than 12 persons are permitted to sit on federal juries, then the times when the verdicts will correspond with the community's view on the issue will inevitably and substantially decline. Confirmation of many of these points may be found in Comment, *Florida's Six-Member Criminal Juries: Constitutional, But Are They Fair?*, 23 U.Fla.L. Rev. 402, 408 (1971). See also Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 Case Western Reserve L.Rev. 529 (1971) for further proof of the dissimilarity in performance of the two juries.

It would seem clear that the data being analyzed shows that the premise for *Williams* was dead wrong. Six-member juries fail significantly to achieve representative cross-sectional requirements and jury verdicts differ widely from their twelve-member counterpart. Both criminal and civil cases are thus affected by reducing jury size. We are thus no longer dealing with a matter of procedure but rather

with a substantive aspect of the concept of the jury itself. To the extent that juries become homogenized by reducing the size, the fundamental right to a fair trial before a fairly selected jury dissipates in strength. It was against this weakening of the civil jury trial that the Seventh Amendment was promulgated.

V. THE TWELVE-PERSON JURY MUST BE RETAINED IF WE ARE TO RETAIN OUR DEMOCRATIC VALUES.

Almost thirty years ago Mr. Justice Black warned in a dissenting opinion that the majority decision marked "a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway v. United States*, 319 U.S. 372, 397 (1943). Justice Black found it necessary to remind his colleagues of the duty to protect the institution of the civil jury trial which the Court had enunciated in the past:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. New York, 315 U.S. 752, 752-53 (1942).

Without question the issue before this Court represents the severest threat to the integrity of the jury yet experienced under the Seventh Amendment. The importance of the Court's ruling is reflected in the fact that 32 districts have already moved to six-member juries on grounds of economy, efficiency and expedition of trials and court calendars. The deathknell of the common law jury of twelve

will be sounded should this Court fail to acknowledge the purpose behind the inclusion of the Seventh Amendment in the Bill of Rights. Within the last two years this Court has allowed the states to reduce jury size and accept non-unanimous jury verdicts. Now the attempt is being made to accomplish the same objectives in the federal system. Should that attempt succeed, we will see the end of the jury as the Founding Fathers knew it. We may even see the end of the jury entirely. A recent article by Robert Kessler outlines the strategy for accomplishing this goal. Referring to the jury as "dysfunctional" (can one imagine saying that to Thomas Jefferson?), Kessler concludes:

> Total abolition of the jury will, of course, require more than a jejune reconstruction of constitutional provisions. As a stopgap measure pending more significant reform, all states should consider at least the enactment of statutes containing provisions for less than unanimous verdicts and for six rather than twelve man juries.

Kessler, *The Crime Crisis and Proposed Procedural Reform*, 5 Loyola-LA L.Rev. 1, 31-32 (1972). One is tempted to conclude that Kessler's error is not so much in thinking the way he does but rather in letting the cat out of the bag.

Certainly this Court does not have to be reminded of the strong connection between the jury and the operational principles of a constitutional democracy. See Scheflin, *Jury Nullification: The Right to Say No*, 45 So.Cal.L.Rev. 168, 185-92 (1972). Studies conducted by the Chicago Jury Project show that jury service enhances feelings of the legitimacy of the judicial process and the democratic nature of the government. *Id.*, at 189-90. Diminution of the size of the jury will increasingly move the law further away from the people it was designed to serve. The ability of the

judicial process to achieve public confidence and support will become more attenuated as the courts move further away from lay participation of all members of the community. Surely it is not too high a cost to retain the historically validated twelve-member jury as a reinforcement of the principles of democratic participation in government which forms the cornerstone of our Republic. The result may be a bit more expensive but a lot more equitable and just. G. K. Chesterton summed up the importance of the issue before this Court when he said:

> And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
>
> • • • •
>
> Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.

Chesterton, *Tremendous Trifles* (1920). The civil jury is no less dignified than the criminal jury. Any weakening of the foundations of democracy weakens the total structure and threatens our freedom. Preservation of the twelve-member federal civil jury is just that serious. The attempt is made today to cut the jury in half. It is fitting that

Professor Zeisel reminded us in the title of his article that the first step is always the hardest but after that: And then there were none!

Respectfully submitted,

LEONARD BOUDIN
NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE

ALAN SCHEFLIN
JON VAN DYKE

TABLE OF CONTENTS

	Page
MOTION OF NOOTER CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*	1
CONSENT TO FILING OF *AMICUS CURIAE* BRIEF	4
BRIEF OF NOOTER CORPORATION AS *AMICUS CURIAE*	5
QUESTION PRESENTED	5
FACTUAL BACKGROUND RELATING TO THE INTEREST OF THE *AMICUS CURIAE* IN THIS CASE	6
SUMMARY OF ARGUMENT	8
ARGUMENT:	
By Limiting The Size Of Civil Juries To Six Persons Through Local Court Rule, The District Courts Fail To Preserve The Common Law Jury As Required By The Seventh Amendment, Exceed The Scope Of Their Rule-Making Authority, And Deny Litigants Substantive State Rights To Which They Are Entitled Under The Doctrine Of *Erie Railroad Co. v. Tompkins*	9
A. In suits at common law the Seventh Amendment requires that the district courts preserve the right to trial by a twelve man common law jury	9
B. The right to a jury trial is a substantive right and there is a substantive difference between a trial before a panel of six and a panel of twelve persons	14

C. The District Court had no authority to promulgate a local rule eliminating the defendant's right to a trial before a jury of twelve persons 16

D. The rule of *Erie Railroad Co. v. Tompkins* requires that the federal courts honor constitutional rights to a twelve man jury guaranteed by the State constitutions 21

CONCLUSION 29

TABLE OF CITATIONS

Cases:

American Publishing Company v. Fisher, 166 U.S. 464 (1897) 9

Baldwin v. New York, 399 U.S. 66 (1970) 13

Beacon Stores, Inc. v. Westover, 359 U.S. 500 (1959) 14

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958) ..... *passim*

Capital Traction Co. v. Hof, 174 U.S. 1 (1899) 9, 23

Colgrove v. Battin, 456 F.2d 1379 (9th Cir. 1972) *cert.* granted Oct. 10, 1972, 41 U.S.L.W. 3166 ..... 2, 19

Copp v. Henniker, 55 N.H. 179 (1875) 23, 24

Daley v. Kennett, 75 N.H. 536, 78 A. 123 (1910) 29

Davis v. Dyer, 62 N.Y. 231 (1882) 29

Dice v. Akron C. & Y. R. Co., 342 U.S. 359 (1951) 18, 25

Douglas v. United States Fidelity and Guaranty Company, 81 N.H. 371, 127 A. 708 (1924) 22

Duncan v. Louisiana, 391 U.S. 145 (1968) 12, 13, 14

East Kingston v. Towle, 48 N.H. 64 (1868) 23

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) ..... *passim*

Hallahan v. Riley, 94 N.H. 338, 53 A.2d 431 (1947) 22

Hanna v. Plummer, 380 U.S. 460 (1965) 20, 26, 27

Herron v. Southern Pacific Co., 283 U.S. 91 (1931) 26

Miner v. Atlass, 363 U.S. 641 (1960) 3, 21

Minneapolis & St. L.R. Co. v. Bambolis, 241 U.S. 211 (1916) 13

Opinion of the Justices, 41 N.H. 550 (1860) 22, 23

Simler v. Conner, 372 U.S. 221 (1963) 14, 21, 26

Thompson v. Utah, 170 U.S. 343 (1898) 9

Williams v. Florida, 399 U.S. 78 (1970) ..... *passim*

Wilson v. Nooter Corporation, Case No. 72-1308 (1st Cir. 1972) ..... *passim*

Constitutional Provisions, Statutes and Rules:

Constitution of the United States
- Article I, §8 16
- Article III 9
- Sixth Amendment ..... *passim*
- Seventh Amendment ..... *passim*

Constitution of New Hampshire Part I, Art. 20 22

Federal Rules of Civil Procedure
- Rule 4(d)(1) 26
- Rule 38(a) 20
- Rule 48 20
- Rule 83 ..... 17, 19, 20

Rules of U.S. District Court for the District of New Hampshire, Rule 30 ..... 10, 19, 20

Rules of U.S. District Court for the District of Montana, Rule 13(d)(1) 10

28 U.S.C. §2071 ..... 3, 16, 17

28 U.S.C. §2072 ..... 3, 17, 18, 19

Other Authorities:

Adm. Office of U.S. Courts, Annual Report 1971 ..... 28, 29

Augelli, Six Member Juries, 3 Seton Hall L. Rev. 281 (1972) 28

Note, The Effect of Jury Size on the Probability of Conviction, 22 Case W. Res. L. Rev. 529 (1971) 15, 16

Reducing the Size of Juries, 5 U. Mich. J. L. Reform 87 (1971) 28

The Supreme Court, 1957 Term, 72 Harv. L. Rev. 77 (1958) 24

Zeisel, And Then There Were None: The Diminution of the Federal Jury, 38 Chi. L. Rev. 710 (1971) 15, 16

Zeisel, The Waning of the American Jury, 58 A.B.A.J. 367 (1972) 15, 29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1442

ROLAND V. COLGROVE,

Petitioner,

v.

HONORABLE JAMES F. BATTIN,
United States District Judge
for the District of Montana,
Billings Division,

Respondent.

MOTION OF NOOTER CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Nooter Corporation respectfully moves, pursuant to Rule 42 of the Rules of this Court, that it be granted leave to file the accompanying brief in this case as *amicus curiae.*

In support of its motion, the applicant Nooter Corporation states:

1. That the applicant has an interest in this case in that it has now pending in the Court of Appeals for the First Circuit an appeal from verdicts entered against it in the case of *Wilson v. Nooter Corporation*,* which case was tried to a six-man jury in the District Court for the District of New Hampshire. One of the questions presented by Nooter Corporation in that appeal is the validity of a local rule whereunder the United States District Court for the District of New Hampshire limited the size of the jury to six persons. This is the same question presented in the instant case with respect to a local rule in the District of Montana.

2. That under the Constitution of The State of New Hampshire, as construed by the New Hampshire Supreme Court, the applicant would have been entitled to a jury of twelve persons had the case of *Wilson v. Nooter Corporation* been tried in the courts of the State of New Hampshire.

3. That the applicant has reviewed the decision of the Ninth Circuit in this case, 456 F.2d 1379 (9th Cir. 1972). It has also reviewed the petitioner's Petition for a Writ of Certiorari and the Motion of International Association of Insurance Counsel for Leave to File Brief as *Amicus Curiae*. In substance, these indicate that the petitioner and the above-named *amicus curiae* propose to argue that a district court cannot by local rule restrict the size of the civil jury to six persons because:

(a) Such a rule is prohibited by the Seventh Amendment of the Constitution of the United States; and

---

*Case No. 72-1308 on the docket of the First Circuit Court of Appeals.

(b) Such a rule exceeds the scope of the rule-making authority of the district courts since it is a "basic procedural innovation" prohibited by *Miner v. Atlass*, 363 U.S. 641 (1960), is inconsistent with the Federal Rules of Civil Procedure, and is contrary to the terms of 28 U.S.C. §2071 and §28 U.S.C. §2072.

4. That argument on the points discussed on the preceeding paragraph may be inadequate.

5. That, to the appellant's best knowledge and belief, no party or *amicus* in this case will make the further argument that such a local rule cannot apply in a diversity case arising under state law where the parties would have a constitutional right to a twelve-man jury if the suit were tried in a state court.

6. That this Court's decision in *Byrd v. Blue Ridge Electrical Cooperative*, 356 U.S. 525 (1958) indicates that conflicts between state and federal jury policies are to be resolved by balancing the respective strengths of the competing policies.

7. That this Court should consider the extent to which its decision in this case may interfere with strong state policies and/or state constitutional rights.

8. That the petitioner has consented to the filing of a brief by this applicant. A copy of his consent is enclosed herewith. The respondent has refused to consent to the filing of the applicant's brief, but has advised the applicant by telephone that he will not object to the applicant's motion to file such a brief.

Respectfully submitted,

NOOTER CORPORATION
By Sulloway, Hollis, Godfrey & Soden

By _____
Its Attorneys

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1442

RICHARD V. COLGROVE,

Petitioner,

v.

HONORABLE JAMES F. BATTIN,
United States District Judge
for the District of Montana,
Billings Division,

Respondent.

CONSENT TO FILING OF AMICUS CURIAE BRIEF

The Petitioner, Richard V. Colgrove, hereby consents, pursuant to Rule 42 of the Supreme Court Rules, that Nooter Corporation may file an *amicus curiae* brief in this proceeding.

Richard V. Colgrove
By Lloyd J. Skedd

/s/_____
His Attorney

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1442

RICHARD V. COLGROVE,

Petitioner,

v.

HONORABLE JAMES F. BATTIN,
United States District Judge
for the District of Montana,
Billings Division,

Respondent.

BRIEF OF NOOTER CORPORATION AS *AMICUS CURIAE*

QUESTION PRESENTED

May a federal district court by local rule restrict the size of the jury in a diversity case to six persons, despite Seventh Amendment guarantees, statutory restrictions on the court's rule-making power, and a state constitutional guarantee of a twelve person jury.

FACTUAL BACKGROUND RELATING TO THE INTEREST OF *AMICUS CURIAE* IN THIS CASE

The *amicus curiae* Nooter Corporation (herein Nooter) has an interest in this case in that it has now pending in the Court of Appeals for the First Circuit an appeal in the case of *Wilson v. Nooter Corporation** which was tried to a six-man jury in the Federal District Court for the District of New Hampshire. The case of *Wilson v. Nooter Corporation* was a negligence action brought by a workman (Wilson) against a subcontractor (Nooter) for personal injuries sustained in an accident on a construction site. The accident was allegedly caused by the negligence of certain Nooter employees, including an alleged "borrowed servant" who was the operator of a crane owned by the general contractor but engaged at the time of the accident in performing a task for Nooter. After being sued by Wilson, Nooter brought a third-party complaint against the general contractor, The H.K. Ferguson Company (Ferguson), for indemnity on the theory that the plaintiff's injuries were caused by Ferguson's failure to operate the crane in a careful and workmanlike manner. Under New Hampshire law, the liability of Nooter to Wilson, the obligation of Ferguson to indemnify Nooter, and the amount of Wilson's damages, present questions for the jury.

Prior to trial the District Court informed counsel that it intended to impanel a six man jury in accordance with its local rule. Counsel for Nooter and for Ferguson both objected, but the Court proceeded to impanel a six man jury. At the conclusion of the evidence the Court

*Case No. 72-1308 on the Docket of the First Circuit Court of Appeals.

directed a verdict in favor of the plaintiff Wilson against Nooter, and in favor of the third-party defendant Ferguson against Nooter as to liability issues. The six-man jury determined damages.

As already mentioned, Nooter has appealed the case to the First Circuit. Broadly stated, one of the questions to be decided on that appeal is the same as that presented for decision in the instant case, that is, the validity of the local rule of the District Court providing for six-man civil juries. For reasons set forth in this brief, Nooter agrees with the petitioner that such rules are generally invalid and cannot be adopted in any District Court.

Nooter's appeal to the First Circuit raises at least one important additional issue which, to Nooter's best knowledge and belief, has not and will not be raised either by the parties or by the other *amicus* in this case. The issue in question exists because in New Hampshire there is a strong and well established state constitutional requirement of a twelve-man jury. As a result, the local rule of the New Hampshire District Court presents an obvious conflict with the state requirement and deprives litigants of a right which they enjoy under state law. Nooter's interest in the recent case is to apprise this Court that such a conflict can be presented by local rules like the one under consideration here. Moreover, Nooter believes that when this Court examines the conflict in question, it will decide that the District Court's rule should yield to the state constitutional requirement of a twelve-man jury.

SUMMARY OF ARGUMENT

This case requires this Court to decide whether the federal district courts can promulgate local rules which limit the size of civil jury panels in diversity cases to six persons. *Nooter* maintains in this brief (1) that by impaneling six man juries the federal district courts fail to provide common law jury trials as guaranteed by the Seventh Amendment of the federal constitution; (2) that there is a qualitative and substantive difference between a trial before a jury of six persons and a jury of twelve; (3) that Congress has not given the district courts authority to promulgate local rules denying litigants their right to a trial before a jury of twelve persons; and (4) that when litigants have a state constitutional right to a twelve-man jury, federal district courts must honor this right in a diversity case arising under state law and tried to a jury.

ARGUMENT

BY LIMITING THE SIZE OF CIVIL JURIES TO SIX PERSONS THROUGH LOCAL COURT RULE, THE DISTRICT COURTS FAIL TO PRESERVE THE COMMON LAW JURY AS REQUIRED BY THE SEVENTH AMENDMENT, EXCEED THE SCOPE OF THEIR RULE-MAKING AUTHORITY, AND DENY LITIGANTS SUBSTANTIVE STATE RIGHTS TO WHICH THEY ARE ENTITLED UNDER THE DOCTRINE OF *ERIE RAILROAD CO. V. TOMPKINS.*

A. In Suits at Common Law the Seventh Amendment Requires that the District Courts Preserve the Right to Trial by a Twelve-Man Common Law Jury.

Until the recent decision of this Court in *Williams v. Florida*, 399 U.S. 78 (1970) it was considered a settled constitutional rule that a jury trial in civil or criminal proceedings in the federal courts required a jury as known at common law, this is, a jury of twelve persons whose unanimous action is necessary for a verdict or conviction. *E.g. Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); *American Publishing Company v. Fisher*, 166 U.S. 464 (1897); *Thompson v. Utah*, 170 U.S. 343 (1898). However, in *Williams, supra*, this Court upheld a conviction obtained by the State of Florida before a jury of six persons who were impaneled pursuant to a Florida statute providing for such juries in all but capital cases. The Court in *Williams* held that the "impartial jury" guaranteed by the Sixth Amendment "in all criminal prosecutions", and the right to a jury trial in criminal cases provided by Article III of the Constitution, do not require a twelve person panel.

In apparent reliance on the assumption that *Williams* can and should be extrapolated to cover civil as well as criminal juries, many federal district courts have enacted local rules limiting the size of civil jury panels to six persons. This case concerns such a rule which was adopted by the Federal District Court for the District of Montana, Billings Division. Local Rule 13(d)(1). This *amicus* has pending in the First Curcuit Court of Appeals an appeal based in part on the following similar local rule of the District Court for the District of New Hampshire.

> *Rule 30. Impaneling Trial Jury*
>
> (a) Number of Jurors and Initial Selection
>
> (1) In all civil cases, the jury shall consist of six members and the clerk shall select by lot the names of six persons to be drawn initially. (2) In all criminal cases, the jury shall consist of twelve members . . . .

By providing for six-man civil juries, the district courts have plainly misread the *Williams* case and miscalculated the extent to which that case changed the old rule insofar as civil juries and the Seventh Amendment are concerned. In point of fact, at footnote 30 of its opinion in *Williams*, this Court expressly stated:

> While much of our discussion in this case may be thought to bear equally on the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional references to the "common law" that occur in the Seventh Amendment might support a different interpretation. 399 U.S. at 92.

The *Williams* case should not, then, be taken as authorization for the use of six-man juries in civil cases.

As the footnote suggests, there is a critical distinction between the Sixth Amendment criminal jury and the Seventh Amendment civil jury. The Seventh Amendment provides: "In suits at *common law* . . . the right of trial by jury shall be *preserved*, and no fact tried by a jury . . . shall be otherwise examined in any court . . . than according to the rules of the *common law*." (emphasis supplied.) The Seventh Amendment refers twice to common law, and it further provides that the right to trial by jury shall be preserved.

The Sixth Amendment, on the other hand, provides only for an "impartial jury" in all criminal prosecutions. It contains no direct language making reference to common law standards, nor does it contain a requirement that "trial by jury shall be preserved". As the *Williams* opinion noted, these textual differences are explained by the special history of the Sixth Amendment. Certain proposed drafts of the Sixth Amendment differed from the final form of the Amendment in that they included proposed requirements of "unanimity for conviction" and "other accustomed requisites". The Framers could not agree that the criminal jury should be a pure common law jury, and this Court apparently concluded in *Williams* that these requirements were deleted in final text of the Sixth Amendment as the result of a compromise. 399 U.S. at 96. Their absence indicated to the Court that, in the case of the Sixth Amendment, a pure common law jury was not intended by the Framers.

> ". . . Where Congress wanted to leave no doubt that it was incorporating existing common law features of the jury system, it knew how to use express language to that effect. . . . And the Seventh Amendment, providing for jury trial in civil cases, explicitly added that "no fact tried by a jury, shall

be otherwise reexamined in any Court of the United States, than according to the rules of the common law." 399 U.S. at 97.

Thus, in holding the Sixth Amendment jury was not a pure common law jury, this Court emphasized that the final draft of that Amendment was a compromise in which certain references to common law requirements were intentionally omitted. This peculiar history does not affect the Seventh Amendment. Moreover, this history makes the Seventh Amendment's two references to "common law" and its requirement that the right to trial by jury be "preserved" seem especially significant when compared with the bare requirement of an "impartial jury" in the Sixth Amendment. Since the *Williams* decision relied in part on these textual differences between the Amendments and specifically pointed out that the Seventh Amendment illustrates that the Framers knew how to incorporate common law features when they wanted to do so, it indicates that the Seventh Amendment, unlike the Sixth, requires a common law jury. At the very least, when the foregoing is taken into consideration together with footnote 30, it is plain that this Court did not intend *Williams* to be taken as a license authorizing federal district courts to promulgate rules denying litigants their long-established Seventh Amendment right to twelve-man juries in civil cases.

Another critical distinction between the Sixth and Seventh Amendments is that in the context of the criminal jury the incorporation doctrine placed this Court under certain pressures not involved in the civil jury context. In this regard it is significant that the first sentence of Section II of the *Williams* decision, which deals with the jury question, refers to the case of *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan* it was held

that the Sixth Amendment is incorporated in the Fourteenth, and that for this reason state courts must provide a Sixth Amendment jury "in all criminal cases that—were they to be tried in federal court—would come within the Sixth Amendment's guarantee." *Williams, supra*, 399 U.S. at 86. As a result of *Duncan*, if the Sixth Amendment required a twelve-man jury, such a jury would be required in state courts. This would have invalidated local practices in many states which allow lesser crimes to be tried before juries not consistent with the strict Sixth Amendment standard. See *Baldwin v. New York*, 399 U.S. 66 (1970) involving the trial of misdemeanors in New York. Having decided *Duncan* imposing the Sixth Amendment on the states, but not wanting to disrupt existing practice unduly or to afflict the states with unmanageable new burdens, this Court resolved this dilemma in *Williams* by diluting the jury guarantee of the Sixth Amendment. See Mr. Justice Harlan's dissent in *Williams*, 399 U.S. at 117.

The local rules under consideration here, like the state procedure under consideration in *Williams*, can present an important problem because of the federal form of our government. The problem here presented is, however, unlike *Williams* in that the Seventh Amendment guarantee of a jury in civil cases has never been incorporated in the Fourteenth Amendment and is not binding on the states, which are at liberty to establish their own procedures for regulating civil trials in state courts. *Minneapolis & St. L.R. Co. v. Bambolis*, 241 U.S. 211 (1916). As a result, unlike in the Sixth Amendment context, no damage is done to existing state practice if it is held that the Seventh Amendment requires a twelve-man jury. On the contrary, as we shall see subsequently, significant damage to state practice will occur if the

federal district courts are allowed, in effect, to rewrite the Seventh Amendment and to provide jury panels of only six persons in civil cases. It is a strange irony that the district courts appear to be relying on *Williams*, which was intended to harmonize federal rights with state practice, when they promulgate local federal rules which can serve to frustrate the fundamental state right to a twelve-man jury panel. Instead of authorizing the local rules under consideration here, if anything *Williams* indicates that this Court has adopted a philosophy of federalism which is incompatible with the rules in question.

B. The Right to a Jury Trial Is a Substantive Right and There Is a Substantive Difference Between a Trial Before a Panel of Six and a Panel of Twelve.

A host of decisions by this Court, involving a variety of different factual situations and legal issues, makes it perfectly plain that the right to a jury trial is a fundamental and substantial right which will be zealously protected by this Court's policy favoring jury trials. See, *e.g.*, *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958); *Beacon Stores, Inc. v. Westover*, 359 U.S. 500 (1959); *Simler v. Conner*, 372 U.S. 221 (1963); *Duncan v. Louisiana*, 391 U.S. 145 (1968). If the right to a jury trial is so important, it logically follows that the right is lost if a trial is held before some fact finder qualitatively different from the traditional jury. In *Williams*, the Court indicated that in order to fulfill the qualitative requirements for the Sixth Amendment jury, the number of jurors would have to be large enough "to promote group deliberation, free from outside attempts of intimidation, and to provide a fair possibility for obtaining a representative cross section of the com-

munity". 399 U.S. at 100. The Court's decision that the six man jury was adequate for Sixth Amendment purposes rested in part on its conclusion that six persons could perform these functions as well as twelve, that "there is no discernible difference between the results reached by the two different-sized juries". 399 U.S. at 101.

In the period since *Williams*, commentators have examined this conclusion and found it erroneous. First, they have examined the authorities and "experiments" which the Court cited to support the view that the size of the jury does not materially affect the outcome of litigation. See footnote 48 of the Court's opinion in *Williams*. Analysis of the authorities cited by the Court reveals that none contain a serious empirical study of the consequences of changing the size of the jury. Instead, their conclusions are at best based on the impressions of certain selected and perhaps biased observers. Thus, the authorities upon which this Court relied in *Williams* are statistically unreliable and do not constitute valid support for the proposition for which they are cited. See Zeisel, And Then There Were None: The Diminution of the Federal Jury, 38 Chi. L. Rev. 710, 713-15 (1971); Zeisel, The Waning of the American Jury, 58 A.B.A.J. 367 (1972); Note, The Effect of Jury Size on the Probability of Conviction, 22 Case W. Res. L. Rev. 529, 535-36 (1971).

The three cited articles go beyond showing that the Court depended upon unreliable studies. By using statistical analysis they also show that, contrary to the Court's conclusion in *Williams*, reducing the size of the jury panel significantly reduces the capacity of the jury to represent minority viewpoints in the community. (A minority group comprising 10% of the population would

receive representation on 72% of twelve man jury panels, but only on 47% of six man jury panels.) In civil cases this reduction in the representative character of the jury will mean that wider variations of verdicts will be returned when a six-man jury is used than when a twelve-man jury is used. In lawyer's terms, this means that the six-man jury is the "gambler's" jury. If the state court provides a twelve-man jury, and the federal court a six-man jury, the federal court becomes the place to go for a longshot verdict or to exclude minority groups from the panel. Zeisel, 38 Chi. L. Rev. at 715-19; also see Note, 22 Case W. Res. L. Rev. at 547 discussing the differences in conviction probability before different sized juries.

Thus, statistical studies of the significance of reducing the size of the jury from twelve to six illustrate that the smaller jury will return results different in character from those returned by the full twelve-man jury. The change accomplished by the various district court rules under consideration here is, then, a fundamental and substantial one which could create a basis for forum shopping. Whatever the court may have concluded in *Williams*, these rules certainly result in a discernible change in the kind of justice received by civil litigants in federal court.

C. The District Court Had No Authority to Promulgate a Local Rule Eliminating the Defendant's Right to a Trial Before a Jury of Twelve Persons.

Under the authority of Article 1, Section 8 of the Constitution the Congress has authorized the district courts to "prescribe rules for the conduct of their business", but has required that such local rules be consistent with Acts of Congress and the rules of practice and procedure prescribed by the Supreme Court. 28

U.S.C. §2071. The Congress has also authorized this Court to prescribe general rules of "practice and procedure" in 28 U.S.C. §2072. The latter act, known as the Enabling Act, is the one pursuant to which this Court promulgated the Federal Rules of Civil Procedure. Federal Rule 83 also limits the rule-making authority of the district courts by prohibiting the district courts from making rules inconsistent with the Federal Rules.

The Enabling Act, as we shall see, imposes significant restrictions on the extent of this Court's rule-making power. Surely the federal district courts under their comparatively narrow grant authority to "prescribe rules for the conduct of their business", as limited by the prohibitions of 28 U.S.C. §2071 and Federal Rule 83, cannot have greater rule-making authority than that conferred by the Enabling Act. Moreover, the restrictions contained in the Act and the provisions of the Federal Rules of Civil Procedure make it perfectly plain that the federal district courts lack authority to provide for six-man jury trials by local rule.

The first three paragraphs of the Enabling Act provide in pertinent part as follows:

> §2072. Rules of Civil Procedure
>
> The Supreme Court shall have the power to prescribe, by general rules . . . the practice and procedure of the district courts . . . in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not

later than the first day of May, and until the expiration of ninety days after they have been thus reported.

The first two paragraphs of the Act are direct and unambiguous in what they allow and what they prohibit. The first paragraph allows this Court to regulate "practice and procedure" in the district courts. The second paragraph, to emphasize that the rule-making authority granted under the Act is procedural only, prohibits this Court from doing certain things under the guise of regulating procedure. First, the initial clause of the second paragraph of the Act prohibits the Court from abridging or modifying the substantive rights of litigants. As we have seen, the right to a trial by jury has been zealously protected by this Court whenever it has been thought to exist. It is a right guaranteed by the Federal Constitution and by the constitutions of most if not all of our states. It is fair to say that it is a "basic and fundamental feature of our system of federal jurisprudence." *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1951). As such, surely it must qualify as a substantive right within the meaning of the Enabling Act, and the first clause of the second paragraph of the Act, standing alone, should prohibit the abridgment, modification or elimination of this right by mere court rule.

The second clause of the second paragraph of the Enabling Act goes further in defining what the Supreme Court cannot do under its authority to regulate "practice and procedure." It states that any rule promulgated by the Court "shall preserve the right of jury trial as at common law *and* as declared by the Seventh Amendment." (emphasis added). Thus, the Enabling Act represents precisely the kind of legislation to which the Court referred in *Williams* to show that "where

Congress wanted to leave no doubt that it was incorporating existing common law features of the jury system, it knew how to use express language to that effect." 399 U.S. at 97. As a result, even if the Court should find that the Seventh Amendment no longer requires a common law jury, this does not mean that common law features can be disposed of by rule of court. The specific language of the Enabling Act forbids rules of court which would fail to preserve the common law jury, or which would abridge or modify litigants' substantive right to trial before such a jury.

The Ninth Circuit held in the instant case that the foregoing construction of the second clause of the second paragraph of the Enabling Act is incorrect, and that the purpose of this clause is to preserve the right to a jury trial "in those cases in which the right existed at common law." *Colgrove v. Battin*, 456 F.2d 1379, 1381 (9th Cir. 1972), *cert. granted* October 10, 1972, 41 U.S.L.W. 3166. The plain answer to this argument is that the Enabling Act does not say so and it could have said so had this been the intended meaning. Mere reference to the Seventh Amendment would have accomplished that result, but the statute goes further, adding the clause "and shall preserve the right of trial by jury as at common law." If this clause is to have any meaning at all, it must mean that the basic common law incidents of a jury are to be preserved, whatever restrictive interpretation might be placed on the Seventh Amendment.

The conclusion that the district courts lack authority to promulgate local rules like Rule 30 of the New Hampshire District Court is also required by the fact that the authority to make local rules like the one in issue here is regulated by Rule 83 F.R. Civ. P.. This rule only allows the district court to make "rules governing its

practice not inconsistent with . . . [the Federal Rules of Civil Procedure]". Yet local Rule 30 in question here is blatently inconsistent with the Federal Rules.

First, it is inconsistent with Rule 48, F.R. Civ. P., which expressly provides that the parties may stipulate that the jury "shall consist of any number less than twelve." Rule 48 would specifically authorize the parties to specify a jury of more than six (but less than twelve), yet local Rule 30 would preclude such a stipulation. Consequently, Rule 48 and local Rule 30 are inconsistent in precisely the way Rule 83 forbids. Local Rule 30 must, then, be invalid. Local Rule 30 is also plainly inconsistent with Rule 38(a) F.R. Civ. P., which provides that "the right of trial by jury as declared by the Seventh Amendment . . . or as given by any statute of the United States shall be preserved to the parties inviolate." Since this Court has never indicated that anything less than a twelve-man jury will satisfy the Seventh Amendment, and since the Enabling Act forbids court rules abridging or modifying substantive rights and requires that the common law jury be preserved, local Rule 30 is plainly inconsistent with rights which Federal Rule 38(a) preserved "to the parties inviolate". Again, it cannot stand in the face of the limitation on local rule-making authority contained in Rule 83.

A final reason why this Court should hold that the district court had no authority to promulgate local Rule 30 is that such a Rule results in a lack of uniformity within the federal system and an unstudied major change in practice. The Court has held that "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." *Hanna v. Plummer*, 380 U.S. 460, 472 (1965). It has held that the rule-making powers are

designed to insure that procedural innovations not be made at the local level, but instead that they "shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Miner v. Atlass*, 363 U.S. 641, 650 (1960). Finally, the Court has held that uniformity of practice is demanded by the Seventh Amendment. *Simler v. Conner*, 372 U.S. 221, 222 (1963). Plainly, if the size of the jury can be determined by the particular whim of a district court judge, the right to a particular sized jury can vary from district to district and from time to time. This can hardly have been intended by Congress when it passed the Enabling Act which requires in paragraph two that the right to jury shall be preserved, and in paragraph three that changes in the rules shall be reported to Congress for review.

D. The rule of *Erie Railroad Co. v. Tompkins* requires that the federal courts honor constitutional rights to a twelve-man jury guaranteed by the State constitutions.

The doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), requires the federal courts in diversity cases to apply state rules of substantive law. The instant case is a diversity case in which the *Erie* rule applies. The case of *Wilson v. Nooter Corporation*, tried in the District Court for the District of New Hampshire and presently pending in the First Circuit, was also a diversity case. Since *Wilson v. Nooter Corporation* dramatically illustrates the *Erie* problem which can be presented by the kind of local rule under consideration here, this section of this brief will discuss the problem with

particular reference to that case. As we shall see, the principles of *Erie*, as elaborated by subsequent decisions of this Court, require that in cases like *Wilson v. Nooter Corporation* the federal courts must honor state constitutional guarantees of a twelve-man jury.

If *Wilson v. Nooter Corporation* had been tried in the New Hampshire state courts, plainly the parties would have been entitled to the protection of the Constitution of The State of New Hampshire which provides in Part I, Article 20 that "the parties have a right to a trial by jury and this method of procedure shall be held sacred. . . ." The New Hampshire Supreme Court has ruled that this guarantee of a jury trial in civil matters "is determined generally by the historical test of its use at common law," *Hallahan v. Riley*, 94 N.H. 338, 339, 53 A.2d 431 (1947), and that "the extent of the right to trial by jury is settled by ascertaining how it was used and practiced before 1784." *Douglas v. United States Fidelity and Guaranty Company*, 81 N.H. 371, 374, 127 A. 708 (1924). Furthermore, the New Hampshire Supreme Court has specifically held that usage at common law required a twelve-man jury.

> We regard it as a well settled and unquestionable rule of construction that the language used by the legislature, in the statutes enacted by them, and that used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted.
>
> The terms "jury", and "trial jury", are, and for ages have been well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense.

A jury for the trial of a cause was a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them; who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them. *Opinion of the Justices*, 41 N.H. 550, 551 (1860), quoted with approval in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

And again:

"The trial by jury, secured to the subject by the constitution, is a trial according to the course of the common law, and the same in substance as that which was in use when the constitution was framed." *East Kingston v. Towle*, 48 N.H. 64. . . . A statute might be passed calling eleven men a jury, and declaring that a jury should consist of eleven men and no more, or that, if eleven out of twelve jurors could agree, they might return a verdict; but such a statute would be an infringement of the constitutional right of trial by jury, because such a trial must be "according to the course of the common law, and the same in substance as that which was in use when the constitution was framed;" and a trial by a jury of eleven men, or a trial with the verdict given by eleven men out of twelve, would not be a trial "according to the course of the common law", and would not be "the same

in substance as that which was in use when the constitution was framed." *Copp v. Henniker*, 55 N.H. 179, 193 (1875).

Thus, in New Hampshire it is clear that the constitution requires a twelve-man jury in civil cases. Any reduction in that number would constitute a substantive change in the right to trial by jury and would be prohibited by the state constitution. If, contrary to the various arguments advanced in earlier sections of this brief, this Court should find that district court rules can establish six-man juries in some states, this does not mean they can do so in a state like New Hampshire where there is a solidly established constitutional right to a twelve-man jury.

The leading case dealing with the question of the relation of the *Erie* rule to the right of trial by jury is *Byrd v. Blue Ridge Electrical Cooperative*, 356 U.S. 525 (1958). *Byrd* presented a question regarding the status of the plaintiff as an employee under the South Carolina Workmen's Compensation Statute. Under the applicable state rule, this question was one for the judge. However, in *Byrd* the Court held that the state rule should not be followed in the federal district court, but that instead the issue should be referred to the jury. In reaching its decision the Court indicated that determining whether to follow state or federal practice in this kind of case required a two-part analysis. See The Supreme Court, 1957 Term, 72 Harv. L. Rev. 77, 148-49 (1958). First, it was necessary to inquire whether the state practice was an "integral part" of the state created right. *Byrd, supra*, 356 U.S. at 536. Second, it was necessary to inquire whether the federal policy favoring jury decision should yield to the state rule "in the interest of furthering the

objective that the litigation should not come out one way in the federal court and another way in the state court." *Id.* at 538.

In *Byrd* the Court found that South Carolina had never stated any reason for its rule that the judge should decide the issue of statutory employment. *Id.* at 535. This rule was not then an "integral part" of the state created right. Also, the Court found that there is a "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." *Id.* at 538. Since there was no significant state policy but a strong countervailing federal policy, and since there was no certainty that there would be a difference in outcome if the federal policy were followed instead of the state rule, the *Byrd* court held that the federal rule should prevail.

In substance, the foregoing description of the *Byrd* case shows that the *Erie* question illustrated by the case of *Wilson v. Nooter Corporation* should be resolved by balancing state and federal policies. The same basic principles was also followed by the Court in the case of *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359 (1951), cited in *Byrd*. The *Dice* case involved the question of whether in accordance with state practice an Ohio court could decide the question of fraud in the obtaining of a release in an F.E.L.A. case, or whether the matter had to be referred to a jury. The court held that the right to a jury trial was "too substantial a part" of the federally created right to yield to a state procedural policy. 342 U.S. at 363. Thus, *Dice* as well as *Byrd* recognizes that strong policies favoring jury trials should yield to procedural rules.

Certain cases may be cited for the proposition that the federal courts are bound to follow federal and not state jury practice. Among the cases which might be cited are *Herron v. Southern Pacific Co.*, 283 U.S. 91 (1931), and *Simler v. Conner*, 372 U.S. 221 (1963). What these cases establish, however, is that in federal court federal rules determine whether a matter is to be decided by the judge or by the jury. They hold that the special relationship between judge and jury in federal court is a matter to be determined by federal law, that "the function of the trial judge in a Federal court is not in any sense a local matter. . . ." *Herron, supra*, 283 U.S. at 94. These cases should not prevent this Court from holding that federal district courts must respect a state constitutional rule relating only to the number of jurors, if the state rule does not interfere with the allocation of function between judge and jury and does not disrupt federal practice. These cases are consistent with *Byrd* and do not create an inflexible rule that federal jury practice is to be determined without regard to the respective strengths of conflicting state and federal policies.

It should also be noted that the case of *Hanna v. Plummer*, 380 U.S. 460 (1965), does not establish a strict rule requiring this Court to uphold the rule of the local district court. In *Hanna*, it was held that Rule 4(d)(1) F.R. Civ. P., which authorizes service of process at the abode of the defendant, controls in federal court even if a state statute would require service in hand. The *Hanna* case is distinguished from the problem presented by this appeal first because *Hanna* involved a conflict between one of the Federal Rules of Civil Procedure and a state rule which was plainly procedural in nature, whereas this case involves a conflict between a local rule of a federal district court and a state constitutional right. Another

important distinction between the two cases is that in *Hanna* the court found that "the difference between the two rules would be of scant, if any, relevance to the choice of a forum." 380 U.S. at 469. Although in *Hanna* the competing state and federal rules were outcome-determinative in the strict sense since the case would have been dismissed if compliance with the state rule had been required, the Court found it more important that the competing rules were essentially "housekeeping" rules. As a result, following the federal rule would mechanically affect "the way in which process was served," *id.*, but it would not affect the character of justice received by the parties.

The *Erie* problem illustrated by *Wilson v. Nooter Corporation* is entirely different. The conflict in question is not between "housekeeping" rules. As we have seen, the representational quality of the jury is significantly changed by the local rule in question. Litigants seeking to exclude minority groups or hoping to obtain longshot verdicts can now be expected to opt for the federal court where their chances of achieving these goals are significantly better than in state court. The effect will be to downgrade the quality of justice received in the federal courts, to create an improper basis of forum selection, and to frustrate important state constitutional safeguards. Surely this result is not appropriate unless some substantial countervailing purpose is served.

Assuming then that the balancing test set forth in *Byrd* provides the appropriate way of resolving the *Erie* problem by the case *Wilson v. Nooter Corporation*, there can be no doubt that in that case the balance should be struck in favor of following the state practice. Consider first the state side of the balance sheet. A twelve-man

jury is a constitutional right in New Hampshire, and New Hampshire case law establishes that a reduction in size even to eleven men would be an unconstitutional substantive change in the jury. Moreover, the change to a six-man panel significantly detracts from the representational capacity of the panel and changes the nature of verdicts returned. The right to a trial before a jury of twelve is then an integral part of litigants' rights in this kind of case under New Hampshire law.

On the federal side of the balance sheet, the policies favoring a six-man jury are not strong. The reasons given for the rule include the argument that it would eliminate congestion on the court docket, see Reducing the Size of Juries, 5 U. Mich. J.L. Reform 87 (1971), and that the smaller jury would entail less administrative expense and inconvenience than the twelve-man jury. See Augelli, Six Member Juries, 3 Seton Hall L. Rev. 281, 287 (1972).

A study of the docket of the District Court for New Hampshire exposes the weakness of the first argument. The 1971 Annual Report of the Director, Administrative Office of the United States, shows that of the 217 cases on the court's docket as of June 30, 1971, 141 or 65% had been on the docket less than one year, and, of the remaining cases, 50 had been on the docket less than two years. Table C 6a, p. A22. Local Rule 30 of the Federal District Court for the District of New Hampshire did not become effective until September 1, 1971. Thus in the fiscal year prior to the effective date of Local Rule 30, there was no congestion problem making the rule in question necessary or appropriate. Furthermore, in the federal district court in New Hampshire jurors are examined on voir dire as a group by the judge. As a result, it is hard to see how reducing the size of the jury will significantly speed up trials. On the question of

expense, jury expense is not a significant fraction of the national judicial budget. Zeisel, The Waning of the American Jury, 58 A.B.A.J. 367, 370 (1971). Furthermore, the Annual Report mentioned above shows there were only twelve completed civil jury trials in the New Hampshire district court during the fiscal year 1970-71. Table C 7, p. A26. Certainly the expense of empaneling twelve-man juries for these few trials cannot create a serious budgeting problem.

Thus, in the case of *Wilson v. Nooter Corporation* the district court's local rule eliminates a state constitutional right which is an integral part of the right to jury trial in this kind of case at state law. It does so for no significant saving either of federal judicial time or money. Under New Hampshire law, "mere inconvenience is not a reason for refusing a jury trial in cases where the right is guaranteed by the constitution." *Davis v. Dyer*, 62 N.H. 231, 239 (1882), *Daley v. Kennett*, 75 N.H. 536, 540, 78 A. 123 (1910). Under these circumstances it is clear that the local rule should yield to state policy under the principles set forth by this Court in the *Byrd* case.

CONCLUSION

For the foregoing reasons Nooter Corporation respectfully prays that this Court rule as follows on this appeal:

(a) That the Court reverse the decision of the Ninth Circuit in the instant case and remand the case to the Ninth Circuit with instructions to issue the writ of mandamus requested by the petitioner; or

(b) If the Court decides to affirm the decision of the Ninth Circuit, that the Court make clear in its decision that local rules of the kind considered here should not be applied in diversity cases where there is a strong state constitutional right to a twelve-man jury; or

(c) If the Court decides to affirm the decision of the Ninth Circuit, but is unwilling to rule as requested in the preceding paragraph, that the Court expressly reserve this question for consideration in a case in which it is directly raised.

Respectfully submitted,

Nooter Corporation

By Sulloway Hollis Godfrey & Soden

By /s/ John C. Ransmeier
JOHN C. RANSMEIER

Its Attorneys

In the Supreme Court

of the

United States

October Term 1972

No. 71-1442

ROLAND V. COLGROVE,

Petitioner,

vs.

JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA,

Respondent.

Brief of Respondent on Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

Petition for Certiorari Filed May 4, 1972
Certiorari Granted October 10, 1972

CALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Respondent

Of Counsel for Respondent:
Dale F. Galles
Harwood, Galles, Gunderson
& Beiswanger
400 Electric Building
Billings, Montana 59101

INDEX

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

STATEMENT OF POSITION 2

LANGUAGE OF OUR UNITED STATES CONSTITUTION AND ITS HISTORICAL BACKGROUND 3

SIGNIFICANT CASES WHICH HAVE CONSTRUED THE SEVENTH AMENDMENT 8

PLACING WILLIAMS-STATE OF FLORIDA IN ITS PROPER PERSPECTIVE 12

RULE 48 F.R.C.P. DOES NOT CONTROL 14

CONCLUSION 18

UNITED STATES SUPREME COURT CASES

Apodaca v. Oregon, May 22, 1972, 406 U.S. 404, 92 S.Ct. ....., 32 L.Ed.(2) 184 11

Baltimore and Carolina Line, Inc., vs. Redman, 1935, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 ....(11

Capitol Traction Co. v. Hof, 1899, 174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873 16

Duncan v. State of Louisiana, May 20, 1968, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491; reh. den. 392 U.S. 947, 88A S.Ct. 2270, 20 L.Ed.2d 1412 12

Page

Ex Parte Peterson, 253 U.S. 300, 40 S.Ct. 543 64 L.Ed. 919 8

Galloway v. United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 9

Hanna v. Plumber, Mass., 1965, 380 U.S. 460 at 472, 85 S.Ct. 1136 at 1144, 14 L.Ed.2d 8 10

Johnson v. Louisiana, May 22, 1972, 406 U.S. 356, 92 S.St. ....., 32 L.Ed.(2) 152 11

Miner v. Atlass, 1960, 363 U.S. 641, 80 S.Ct. 1300, 4 L.Ed.2d 1462 17

Patton v. United States, 1930, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 584 16

Ross v. Bernhard 1970, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 11

Williams v. State of Florida, June 22, 1970, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 ..... 3, 12, 13, 14, 16

CIRCUIT COURT CASES

Byrne v. Matczak, 3rd C.C., 1958, 254 F.2d 525, cert. den. 358 U.S. 816, 79 S.Ct. 24, 3 L.Ed.2d 58 9

Cooley v. Strickland Transport Co., 5th C.C. En Banc, April 1, 1972, 459 F.2d 779 ..... 11, 15

Fox v. United States, 5th C.C., 1969, 417 F.2d 84 11

MONTANA DISTRICT COURT RULES

Page

Rule 13(d)(1) 1

FEDERAL RULES OF CIVIL PROCEDURE

38(a) F.R.C.P. 15

48 F.R.C.P. 14

83 F.R.C.P. 14

FEDERAL RULES OF CRIMINAL PROCEDURE

23(b) F.R.Crim.P. 15

UNITED STATES CONSTITUTION

Article I (8) (Clause 9, 18) 5, 6

Article III, Par. 1 ..... 5, 6

Sixth Amendment 7

Seventh Amendment 8

In the Supreme Court

of the

United States

October Term 1972

No. 71-1442

ROLAND V. COLGROVE,

Petitioner,

vs.

JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA,

Respondent.

Brief of Respondent on Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

QUESTION PRESENTED

The District Court of the United States for the District of Montana promulgated its district court *Rule 13(d)(1)* prescribing a jury of six persons for the trial of civil cases, which rule became effective *September 1,* 1971.

Petitioner requested a mandate from the Ninth Circuit Court declaring the rule void and invalid as an invasion of a federal constitutional guarantee to a jury of twelve persons in civil actions. The Ninth Circuit Court in a written opinion reported at *456 F(2) 1370* denied the request, and upheld the constitutional validity of the district court rule. Petitioner petitioned for a Writ of Certiorari to review the judgment of the Ninth Circuit Court which this court granted on *October 10, 1972*. Accordingly, the question presented is the constitutional validity of a rule promulgated by a District Court of the United States prescribing a jury of six persons for the trial of civil cases.

STATEMENT OF POSITION

Neither the federal Constitution, nor any federal statute, nor any rule of Federal Civil Procedure, nor any rule of the Supreme Court of the United States spells out a requirement that a jury in a civil action shall consist of twelve persons, nor prevents nor precludes a district court from promulgating a rule of procedure requiring a jury of six persons in such cases.

When the constitutional language of the *Seventh Amendment* is placed in its proper perspective in light of the historical background in which the first seven Articles of our Constitution were promulgated at the First Constitutional Convention, and in light of the historical background in which *Amendments 6* and *7* were

promulgated by the First Congress; when we give proper and adequate consideration to the language of those decisions of the Supreme Court of the United States which have construed the scope of the *Seventh Amendment* in other areas; and when the language of the Constitution, its historical background, and the language of the decisions of our Supreme Court which have construed the scope of the *Seventh Amendment* are all placed in proper perspective with the decision of this court in *Williams v. State of Florida, June 22, 1970, 399, U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* the rule of the District Court of the United States for the District of Montana prescribing a six-man jury in civil cases is a valid and subsisting rule of procedure, and the decision of the Ninth Circuit Court should be affirmed.

LANGUAGE OF OUR UNITED STATES CONSTITUTION AND ITS HISTORICAL BACKGROUND

We do not have available locally the debates of the original constitutional convention. We do have, however, the writings of numerous historians and, in particular, the Federalist Papers published by Alexander Hamilton. Hamilton's *Federalist Paper 83,* published *May 28, 1788,* confirms the other historians we have read that the provision for trial by jury in criminal cases was considered a burning necessity, and that it was also considered desirable to have trial by jury in

civil cases as an excellent method of determining questions of property under proper regulation *(Lodge's Federalist, page 521)*. The great difference in jury practice among the several states made promulgation of a proviso that was satisfactory to all concerned an extremely difficult matter. A proposal was made by Pennsylvania that "trial by jury shall be as heretofore"; and by Massachusetts for trial by jury in actions at common law "if the parties requested it". Both were defeated. We understand that two modifications were proposed when the Committee on Style submitted its final draft to the convention on *September 12, 1787*, one of which was a specific provision for jury trials in civil cases. It was neither accepted nor rejected, but was returned to the Committee on Style to provide such a clause for consideration. The historians indicate that the failure to include any proviso thereafter in the original seven articles of the Constitution was not because of any disagreement concerning its advisibility, but because (1) the delegates were then ready to go home; (2) the difficulties in drafting a general rule that would satisfy all states because of the variety of court practices in the different states; (3) there was some fear among convention leaders that prolonged and protracted dispute and debate over the issue might very well devastate the agreement that had already been arrived at; (4) the delegates had fulfilled the burning necessity for preserving the right of jury trial in all

criminal cases; and (5) last, but not least, the responsible delegates felt that there was no danger in leaving the drafting and determination with respect to civil cases for Congress to promulgate in the future under the powers vested in Congress in *Article I (8)* along with the judicial powers vested in such inferior courts as might be created by Congress from time to time as provided in *Article III.* *Article I (8)* provides that Congress shall have power:

> "To constitute tribunals inferior to the Supreme Court. *(Clause 9)*

Article III, paragraph 1, vests judicial power in the one Supreme Court of the United States:

> "and such inferior courts as the Congress may from time to time ordain and establish."

Article III likewise expressly provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; * * *".

We find additionally significant to our problem the Necessary and Proper Clause of *Article I (8)* which vests power in Congress:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution and the government of the United States, or in any department or officer thereof." *(Clause 18)*

None of the foregoing language of the original seven articles of the original Constitution has ever been altered, changed, nor disturbed in any manner.

Federalist Paper 83 by Alexander Hamilton was published *May 28, 1788,* between adjournment of the original convention and the convening of the First Congress pointing out that the most severe criticism of the first seven articles of the original Constitution heard in New York, and perhaps on all other states, was "relative to the want of the constitutional provision for the trial by jury in civil cases." Many persons feared that by the failure of the Constitution to include such a provision, it was abolished. Hamilton tried to allay such fears in *Paper 83.*

> "A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. * * *" *(Pp. 518, Lodge; Pp. 357, Beard)*

We add in addition to the power granted to constitute the courts. the supplementary power vested in Congress by the "Necessary and Proper" *Clause 18 of Article I (8)* coupled with the express vesting of judicial power by *Article III* in all cases in law or equity in such inferior courts as the Congress may from time to time ordain and establish. Hamilton also stated:

> "The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails. * * * It is conceded by all

reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutatory point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature." *(Lodge, Pp. 531-532)*

It seems historically clear that the delegates desired to preserve the right of trial by jury in both civil and criminal cases; but a plan that would define the precise consistency of juries that would satisfy all delegates, and all states, could not be drawn up. For that reason, the Constitution required that the right of trial by jury be preserved, but the plan for the consistency of juries was left to the Congress to legislate from time to time as needs might require.

The omission of any language in *Amendments 6* and *7* adopted by the First Congress in *1789* which would spell out or prescribe the number of jurors carries great significance when viewed in the light of that historical background.

"AMENDMENT 6

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

"AMENDMENT 7

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

SIGNIFICANT CASES WHICH HAVE CONSTRUED THE SEVENTH AMENDMENT

The language of Supreme Court decisions which have construed the scope of the *Seventh Amendment* in other areas is significant.

In an opinion by *Justice Brandeis* in *Ex Parte Peterson, 1920, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919,* it was said with respect to the *Seventh Amendment:*

"The command of the Seventh Amendment that the right of trial by jury shall be preserved; does not require that old forms of practice and procedure be retained (citing cases * * *). New devices may be used to adapt the ancient institution (jury trial) to present needs and to make of it an efficient instrument in the administration of justice. Indeed such changes are essential to the preservation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that ultimate determination of issues of fact by the jury be not interfered with." *(309-310, U.S.; 546, S. Ct.; 923-924, L.Ed.)*

In *Gallowoy v. United States, 1943, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458,* the Ninth Circuit Court had affirmed the granting of a motion for directed verdict. With respect to such procedure under the *Seventh Amendment* the Supreme Court said in part:

> "The (Seventh) Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were 'the rules of the common law' then prevalent, including the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common law rules on procedural matters among the states, and between them and England. * * *" *(390-392, U.S.; 1087-1088, S.Ct.; 1471, L.Ed.)*

In *Byrne v. Matczak, 3rd C.C., 1958, 254 F.2d 525, cert. den., 358 U.S. 816, 79 S.Ct. 24, 3 L.Ed.2d 58,* a District Judge permitted a trial jury to disperse during deliberations, go to their homes, and return to their deliberations after a night of rest. It was argued that traditionally at common law the trial jury had to be held intact while deliberating, and the failure to do so violated the right of trial by jury as guaranteed by the *Seventh Amendment.* In rejecting such contention, the court said:

> "True, the allowance of a dispersal is contrary to the old common law. And there is, in Dimick v. Schiedt, 1935, 293 U.S. 474, 55 S.Ct. 296, 79

L.Ed. 603, strong language to the effect that the Seventh Amendment perpetuated jury procedures as they existed in 1791. However prior to Dimick v. Schiedt, the entire development of this area was to the effect that the constitutional conception of jury trial is not inflexible in all details, so long as the essential elements of the institution are preserved. E.g., Gasoline Products Co. v. Champlin Refining Co., 1931, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188; Ex parte Peterson, 1920, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919, and and see generally Scott, Trial by Jury and the Reform of Civil Procedure, 1918, 31 Harv. L.Rev.669. And since Dimick v. Schiedt, supra, this older line of reasoning has been reaffirmed in Galloway v. United States, 1943, 319 U.S. 372, 388-386, 63 S.Ct. 1077, 87 L.Ed. 1458. In this view, fair new procedures which tend to facilitate proper fact finding are allowable although not traditional." *(528-529)*

In *Hanna v. Plumber, Massachusetts, 1965, 380 U.S. 460 at 472, 85 S.Ct. 1136 at 1144, 14 L.Ed. 2d 8,* the court said while construing the validity of service of process under federal rule which apparently was fatally defective under state court provisions:

"For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing practice and pleading in those courts, which in turn include power to regulate matters which, though falling within uncertain area between substance and procedure, are rationally capable of classification as either."

The phrase "common law" as first used in the *Seventh Amendment* was held to simply preserve the right to a trial by jury in actions involving legal rights as dis-

tinct from equitable rights *(Ross v. Bernhard, 1970, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729).*

The second usage in the amendment of the phrase "common law" simply assured that no judge or judges shall substitute their decisions on fact issues in the place and stead of the fact findings of a jury *(Baltimore and Carolina Line Inc. v. Redman, 1935, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636).*

In *Cooley v. Strickland Transportation Co., April 1, 1972, 459 F.2d 779,* the Fifth Circuit Court En Banc upheld the validity of a similar District Court Rule. Part of this same court in *1969* decided the case of *Fox v. United States, 417 F.2d 84,* relied upon by petitioner.

Johnson v. Louisiana, May 22, 1972, 406 U.S. 356, 92 S.Ct. ....., 32 L.Ed. (2d) 152, and *Apodaca v. Oregon, May 22, 1972, 406 U.S. 404, 92 S.Ct. ....., 32 L.Ed.(2) 184,* upheld the validity of state statutes authorizing less-than-unanimous verdicts in criminal cases. Apparently the state laws were conceded by the appellant to be constitutionally valid insofar as the *Seventh Amendment* was concerned in view of *Duncan v. Louisiana, infra.*

We repeat that when we consider that the framers of our Constitution phrased the *Seventh Amendment* in general terms, and used general language, and refrained from prescribing details that would be binding upon all future generations; and when we consider the decision in *Williams v. State of Florida* in its proper

perspective, the conclusions drawn by petitioner are simply not warranted.

PLACING WILLIAMS-STATE OF FLORIDA IN ITS PROPER PERSPECTIVE

Prior to the decision of the Supreme Court of the United States in *Williams vs. State of Florida, June 22, 1970, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* no case presented the precise, specific issue of whether or not the scope of the right of trial by jury guaranteed in criminal cases by the *Sixth Amendment,* or in civil cases by the *Seventh Amendment,* required the number of jurors to be fixed precisely at twelve. We find the *Williams* case to be of particular significance since it did involve the right of trial by jury in a criminal case. Certainly, if the language fo the Constitution cannot be construed as requiring any particular number of jurors in a criminal case, it is difficult to see how it can be so construed to prescribe the number of jurors in a civil case.

Case decisions handed down shortly before *Williams-State of Florida* assist in placing that case in its proper perspective.

In *Duncan v. State of Louisiana, May 20, 1968, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491; reh. den. 392 U.S. 947, 88A S.Ct. 2270, 20 L.Ed.2d 1412,* a dissenting opinion by *Justic Harlan,* joined by *Justice Stewart,* stated in part:

"* * * If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every sub-principle is equally fundamental to ordered liberty.

Examples abound. I should suppose it obviously fundamental to fairness that a 'jury" means an 'impartial *jury'. I should think it equally obvious that the rule, imposed long ago in the federal courts, that 'jury' means 'jury of exactly twelve', is not fundamental to anything: there is no significance except to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts, although unanimity has not been found essential to liberty in Britain, where the requirement has been abandoned." *(181, U.S.; 514, L.Ed.; 1465, S.Ct.)*

The foregoing language of *Justice Harlan* was partially utilized by the majority in *Williams-State of Florida:*

"We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics'. Duncan v. Louisiana supra, at 182, 20 L.Ed2d at 514 (Harlan, J., dissenting)." *(102, U.S.; 461, L.Ed.2d; 1907, S.Ct.)*

We shall not belabor *William v. State of Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* which held:

> "* * * The question in this case then is whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six. We hold that the 12 man panel is not a necessary ingredient of 'trial by jury', and that respondent's refusal to impanel more than six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the states through the Fourteenth." *(86, U.S.; 452, L.Ed.2d; 1898, S.Ct.)*

When *Williams-State of Florida,* considered in perspective, upheld the constitutional validity of a jury of six persons in a criminal case, then the validity of a district court rule requiring six jurors in civil cases should be even more clear.

Twelve jurors are required in a federal criminal trial—not because of the phraseology of the *Sixth Amendment,* but because it is expressly required by *Rule 23(b)* of the Federal Rules of Criminal Procedure. There is no such requirement in the Federal Rules of Civil Procedure.

RULE 48 F.R.C.P. DOES NOT CONTROL

Rule 83 F.R.C.P. authorizes a district court to make rules governing its practice not inconsistent with the prescribed rules of civil procedure, and to furnish copies of the district rules so promulgated to the Supreme Court. The concluding sentence of *Rule 83* provides:

> "* * * In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Some thirty-one district courts or more throughout the the nation promulgated a six-man jury rule comparable to that in Montana, and we understand they had all been filed with this court and remained on file with this court without objection *(Cooley v. Strickland, Supra, 459 F.2d at P. 785).*

The only mandate for the consistency of a jury in a civil case is found in *Rule 38(a) F.R.C.P.* which provides:

> "(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Compare the foregoing language with *Rule 23(b) F.R.Crim.P.:*

> "(b) Jury of Less than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12."

The foregoing language of both *Rule 38(a) F.R.C.P.* and *Rule 23(b) F.R.Crim.P.* must then be compared with *Rule 48 F.R.C.P. which provides:*

> "Juries of Less than Twelve—Majority Verdict. The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict of finding of the jury."

To reach a conclusion that this rule is a mandate that a civil jury must consist of twelve persons does not

merely twist and strain the language used, but requires the insertion of language that was never in fact used. Petitioner urges that a Court cannot rewrite the rules by judicial interpretation, and then turns right around and requests the Court to do precisely just that in order to rewrite *Rule 48 F.R.C.P.* to arrive at petitioner's strained construction.

We have no doubt that when *Rule 48* was promulgated there was a general assumption that a jury required by the *Seventh Amendment* would consist of twelve persons. The same situation exactly existed with respect to the jury requirement under the *Sixth Amendment* until the precise issue was presented to this court for the first time in *Williams v. State of Florida, supra.* The cases of *Capitol Traction Co. v. Hof, 1899, 176 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873,* and *Patton v. United States, 1930, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 584,* relied upon by petitioner were discussed in *Williams v. State of Florida,* and this court did not hesitate to reject any construction based on mere unfounded assumptions such as can be found in those cases. This is the first occasion presented to this court for deciding the precise issue of whether or not the *Seventh Amendment* requires that a federal civil jury must consist of twelve persons. There is no logical reason for a different treatment in construing the *Seventh Amendment* than was used in *Williams-State of Florida.* The historical constitutional background, coupled with the Constitutional

vesting of power in Congress to constitute and create inferior courts, coupled with the Necessary and Proper Clause, coupled with the vesting of juducial power in this court "and such inferior courts as the Congress may from time to time ordain and establish," and last, but not least, coupled with the apparently intentional, broad, general language of both the *Sixth* and *Seventh Amendments*, clearly suggest that all that is required under our Constitution in either type of case is a fair and impartial jury without regard to the number of persons.

The language of the *Seventh Amendment* does not require that a fair and impartial jury must consist of twelve persons. In the absence of an act of Congress, or a rule of this court spelling out in plain and unambiguous language that a civil action jury must consist of twelve persons, the more than thirty-one district court rules prescribing a six-man jury in civil cases do not violate any constitutional guarantees.

We are advised by counsel for one of the Amicus Curiae of their intention to rely upon the decision of *Miner v. Atlass, 1960, 363 U.S. 641, 4 L.Ed.2d 1462, 80 S.Ct. 1300,* cited and relied upon by petitioner in opposition to the position we have taken in this brief. We have no quarrel with the decision that was reached in *Miner v. Atlass.* We believe it was a sound result. It simply has no factual or legal application to this case. The de bene esse statute prescribed the only factual circumstances under which depositions could be taken, and

the only circumstances under which they could be used in an admiralty trial proceeding. The United States District Court for the Northern District of Illinois adopted a rule which in effect differed from and went beyond the statutory conditions precedent. The circuit court affirmed by this court simply held that a district court had no such power. If there was an act of Congress, or a rule promulgated by this court, requiring that a civil action jury authorized by the *Seventh Amendment* must consist of twelve persons then *Miner v. Atlass* would be applicable and controlling in this case. No such facts exist in this case.

CONCLUSION

The intention of the framers of our Constitution to preserve the ancient distinctions in civil cases between law and equity is clear, and it is apparent that there was the expressed desire to require a trial before a fair and impartial jury in civil common law actions. The framers of our Constitution foresaw the possibility of vast social and economic changes in the country which would require changes in the form required for a fair and impartial jury to properly administer justice. For that reason the framers of our Constitution very wisely spelled out a requirement for a trial by jury but did not prescribe details. Instead, the Constitution empowered the Congress to create and establish the inferior courts, to regulate their conduct, and to make any changes from

time to time as the changing social and economic conditions might require as long as a fair and impartial jury was assured.

District courts having been vested with rule making power as long as it does not contradict or conflict with the Constitution, statutes, or Supreme Court rule, and since the rules promulgated by more than thirty-one of the district courts of the United States throughout the country prescribing the number of jurors in the trial of civil cases present no such conflict, we respectfully submit that the Montana United States District Court rule was and is a valid and subsisting rule.

Again we respectfully suggest that in view of the simplicity of the only question presented that this court affirm the decision of the Ninth Circuit Court without the necessity of oral argument.

CALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Respondent

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COLGROVE *v.* BATTIN, U. S. DISTRICT JUDGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-1442. Argued January 17, 1973—Decided June 21, 1973

Local federal court rule providing that a jury for the trial of civil cases shall consist of six persons comports with the Seventh Amendment requirement and the coextensive statutory requirement of 28 U. S. C. § 2072 that the right of trial by jury be preserved in suits at common law, and is not inconsistent with Fed. Rule Civ. Proc. 48 that deals only with parties' stipulations regarding jury size. Pp. 3-16.

456 F. 2d 1379, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which POWELL, J., joined. MARSHALL, J., filed a dissenting opinion, in which STEWART, J., joined. POWELL, J., filed a dissenting opinion.

sought mandamus from the Court of Appeals for the Ninth Circuit to direct respondent to impanel a 12-member jury. Petitioner contended that the local Rule (1) violated the Seventh Amendment;[2] (2) violated the statutory provision, 28 U. S. C. § 2072, that rules ". . . shall preserve the right to trial by jury as at common law and as declared by the Seventh Amendment . . .";[3] and (3) was rendered invalid by Rule 83 of the Federal Rules of Civil Procedure because "inconsistent with" Fed. Rule Civ. Proc. 48 that provides for juries of less than 12 when stipulated by the parties.[4] The Court of Appeals found no merit in these contentions, sustained the validity of Local Rule 13 (d)(1), and denied

---

[2] The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

State court decisions have usually turned on the interpretation of state constitutional provisions. See Ann., 47 A. L. R. 3d 895 (1973).

[3] 28 U. S. C. § 2072 provides:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions."

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

[4] Rule 48, Federal Rules of Civil Procedure, provides:

"The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Rule 83, Federal Rules of Civil Procedure, provides:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

the writ, 456 F. 2d 1379 (1972). We granted certiorari, 409 U. S. 841 (1972). We affirm.

I

In *Williams* v. *Florida*, 399 U. S. 78 (1970), the Court sustained the constitutionality of a Florida statute providing for six-member juries in certain criminal cases. The constitutional challenge rejected in that case relied on the guarantees of jury trial secured the accused by Art. III, § 2, cl. 3, of the Constitution and by the Sixth Amendment.[5] We expressly reserved, however, the question whether "additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation" with respect to jury trial in civil cases. 399 U. S., at 92, n. 30. We conclude that they do not.

The pertinent words of the Seventh Amendment are: "In suits at common law . . . the right of trial by jury shall be preserved . . . ."[6] On its face, this language

---

[5] Art. III, § 2, cl. 3, provides:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

[6] The reference to "common law" contained in the second clause of the Seventh Amendment is irrelevant to our present inquiry because it deals exclusively with the prohibition contained in that clause against the indirect impairment of the right of trial by jury through

is not directed to jury characteristics, such as size, but rather defines the kind of cases for which jury trial is preserved, namely, "suits at common law." And while it is true that "[w]e have almost no direct evidence concerning the intention of the framers of the seventh amendment itself,"[7] the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated not by concern for preservation of jury characteristics at common law but by fear that the civil jury itself would be abolished unless protected in express words. Almost a century and a half ago, this Court recognized that "[o]ne of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons* v. *Bedford*, 28 U. S. (3 Pet.) 433, 446 (1830). But the omission of a protective clause from the Constitution was not because an effort was not made to include one. On the contrary, a proposal was made to include a provision in the Constitution to guarantee the right of trial by jury in civil cases but the proposal failed because the States varied widely as to the cases in which civil jury trial was provided, and the proponents of a civil jury guarantee found too difficult the task of fashioning words appropriate to cover the different state practices.[8] The

judicial reexamination of factfindings of a jury other than as permitted in 1791. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657 (1935); *Parsons* v. *Bedford*, 28 U. S. (3 Pet.) 433, 447–448 (1830); 5 Moore's Federal Practice ¶ 38.08, at 86–90 (2d ed. 1971).

[7] Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 291 (1966).

[8] See 2 M. Farrand, Records of the Federal Convention 587 (1911). See also Henderson, *supra*, n. 7, at 292–294.

The question of a provision for the protection of the right to trial by jury in civil cases apparently was not presented at the Constitutional Convention until a proposed final draft of the Constitution was

strong pressures for a civil jury provision in the Bill of Rights encountered the same difficulty. Thus, it was agreed that, with no federal practice to draw on and

---

reported out of the Committee on Style and Arrangement. At that point, Mr. Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." 2 M. Farrand, *supra*, at 587. This provoked the following discussion:

"Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter.

"Mr. Gerry urged the necessity of Juries to guard [against] corrupt Judges. He proposed that the Committee last appointed should be directed to provide a clause for securing the trial by Juries.

"Col. Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had prefaced with a Bill of Rights, & would second a Motion if made for the purpose . . . ." *Ibid.*

Three days later, a proposal was made by Mr. Gerry and Mr. Pinckney to add the following language to the Art. III guarantee of trial by jury in criminal cases: "And a trial by jury shall be preserved as usual in civil cases." This proposal prompted the following reaction:

"Mr. Gorham. The constitution of Juries is different in different States and the trial itself is *usual* in different cases in different States.

"Mr. King urged the same objections.

"Genl. Pinckney. He thought such a clause in the Constitution would be pregnant with embarrassments.

"The motion was disagreed to nem. con." *Id.*, at 628.

James Wilson of Pennsylvania defended the omission at the Pennsylvania Convention convened to ratify the Constitution:

"The cases open to a jury, different in different states; it was therefore impracticable, on that ground, to have made a general rule. The want of uniformity would have rendered any reference to the practice of the states idle and useless: and it could not, with any propriety, be said, that 'the trial by jury shall be as heretofore:' since there has never been any federal system of jurisprudence, to which the declaration could relate. Besides it is not in all cases that the trial by jury is adopted in civil questions: for causes depending in courts of admiralty, such as relate to maritime captures,

since state practices varied so widely, any compromising language would necessarily have to be general. As a result, although the Seventh Amendment achieved the primary goal of jury trial adherents to incorporate an explicit constitutional protection of the right of trial by jury in civil cases, the right was limited in general words to "suits at common law." [9] We can only conclude,

---

and such as are agitated in the courts of equity, do not require the intervention of that tribunal. How, then, was the line of distiction to be drawn? The convention found the task too difficult for them; and they left the business as it stands—in the fullest confidence, that no danger could possibly ensue, since the proceedings of the supreme court are to be regulated by the congress, which is a faithful representation of the people: and the oppression of government is effectively barred, by declaring that in all criminal cases, the trial by jury shall be preserved." 3 M. Farand, Records of the Federal Convention 101 (1911).

A proponent of a guarantee responded:

"The second and most important objection to the federal plan, which Mr. Wilson pretends to be made in a disingenuous form, is the entire abolition of the trial by jury in civil cases. It seems to me that Mr. Wilson's pretended answer is much more disingenuous than the objection itself . . . . He says, 'that the cases open to trial by jury differing in the different States, it was therefore impracticable to have made a general rule.' This answer is extremely futile, because a reference might easily have been made to the common law of England, which obtains through every State, and cases in the maritime and civil law courts would, of course, be excepted . . . ." Quoted in Henderson, *supra*, n. 7, at 296-297. See also I J. Elliot, The Debates in the Several State Conventions, on the Adoption of the Federal Constitution (2d ed. 1836).

[9] That the words "common law" were used merely to establish a general rule of trial by jury in civil cases was the view of Justice Story in the discussion in his Commentaries of the Seventh Amendment and the Judiciary Act of 1789:

"The phrase, 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared, in the third article, 'that the judicial power shall extend to all cases in *law and equity* arising under this constitution, the laws of the United States, and treaties made, or

therefore, that by referring to the "common law," the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury.[10] In short, what was said in *Williams* with respect to the criminal jury is equally applicable here: constitutional history reveals no intention on the part of the Framers "to equate the constitutional and common-law characteristics of the jury." 399 U. S., at 99.

Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury right preserved in cases covered by the Amendment, as "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure . . . ." *Baltimore & Carolina Line, Inc.* v. *Red-*

---

which shall be made under their authority,' &c., and 'to all cases of *admiralty and maritime jurisdiction*.' It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene; and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires, that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that the distinction was present to the minds of the framers of the amendment. By *common law* they meant, what the constitution denominated in the third article 'law' . . . . And congress seem to have acted with reference to this exposition in the judiciary act of 1789, ch. 20, [which was contemporaneous with the proposal of this amendment;] . . . ." 3 J. Story, Commentaries on the Constitution of the United States 654–646 (L. Levy ed. 1970).

[10] Constitutional history does not reveal a single instance where concern was expressed for preservation of the traditional number 12. Indeed, James Wilson of Pennsylvania, a member of the Constitutional Congress and later a Justice of this Court, stated: "When I speak of juries, I feel no peculiar predilection for the number twelve . . . ." II J. Andrews, The Works of James Wilson 503 (McCloskey ed. 1967).

man, 295 U. S. 654, 657 (1935).[11] The Amendment therefore does not "bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791," *Galloway* v. *United States*, 319 U. S. 372, 390 (1943); see also *Ex parte Peterson*, 253 U. S. 300, 309 (1920); *Walker* v. *New Mexico & S. Pac. R. Co.*, 165 U. S. 593, 596 (1897), and "[n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. . . ." *Ex parte Peterson*, *supra*, at 309–310; *Funk* v. *United States*, 290 U. S. 371, 382 (1933).

Our inquiry turns then to whether a jury of 12 is of the substance of the common law right of trial by jury. Keeping in mind the purpose of the jury trial in criminal cases to prevent government oppression, *Williams*, *supra*, at 100, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498 (1931), the question comes down to whether jury performance is a function of jury size. In *Williams*, we rejected the notion that "the reliability of the jury as a factfinder . . . [is] a function of its size," 399 U. S., at 100–101, and

[11] See also Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 671–672 (1918):

"Although the incidents of trial by jury which existed at the time of the adoption of the constitutional guaranty are not thereby abolished, yet those incidents are not necessarily made unalterable. Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form."

nothing has been suggested to lead us to alter that conclusion. Accordingly, we think it can not be said that 12 members is a substantive aspect of the right of trial by jury.

It is true, of course, that several earlier decisions of this Court have made the statement that "trial by jury" means "a trial by a jury of twelve . . . ." *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13 (1899); see also *American Publishing Co.* v. *Fisher*, 166 U. S. 464 (1897); *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900). But in each case, the reference to "a jury of twelve" was clearly dictum and not a decision upon a question presented or litigated. Thus, in *Capital Traction Co.* v. *Hof*, *supra*, the case most often cited, the question presented was whether a civil action brought before a justice of the peace of the District of Columbia was triable by jury, and that question turned on whether the justice of the peace was a judge empowered to instruct them on the law and advise them on the facts. Insofar as the *Hof* statement implied that the Seventh Amendment required a jury of 12, it was at best an assumption. And even if that assumption had support in common law doctrine,[12] our canvass of the relevant constitutional history, like the history canvassed in *Williams* concerning the criminal jury, "casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law . . . then it was necessarily preserved in the Constitution." 399 U. S., at 92–93. We cannot, therefore, accord the unsupported dicta of these earlier decisions the authority of decided precedents.[13]

---

[12] Although *Williams* proceeded on the premise that the common law jury was composed of 12 members, juries of less than 12 were common in this country throughout colonial times. See the cases and statutes cited in Fisher, *supra*, n. 1, at 529–532.

[13] See Devitt, The Six-Man Jury in the Federal Court, 53 F. R. D. 273, 274 (1971); Augelli, Six Member Juries in Civil Actions in the

There remains, however, the question whether a jury of six satisfies the Seventh Amendment guarantee of "trial by jury." We had no difficulty reaching the conclusion in *Williams* that a jury of six would guarantee an accused the trial by jury secured by Art. III and the Sixth Amendment. Significantly, our determination that there was "no discernible difference between the results reached by the two different-sized juries," 399 U. S., at 101, drew largely upon the results of studies of the operations of juries of six in civil cases.[14] Since then, much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in *Williams*.[15] Thus, while we express no view

---

Federal Judicial System, 3 Seaton Hall L. Rev. 281, 285 (1972); Croake, Memorandum on the Advisability and Constitutionality of Six Man Juries and 5/6 Verdicts in Civil Cases, 44 N. Y. State B. J. 385 (1972). See also *Leger* v. *Westinghouse Electric Corp.*, 54 F. R. D. 574 (1972); contra, *Winsby* v. *John Oster Mfg. Co.*, 336 F. Supp. 663 (WD Pa. 1972).

[14] 399 U. S., at 101 n. 48.

[15] Arguments pro and con the effectiveness of a jury of six compared to a jury of 12 will be found in *Devitt*, *supra*, n. 10; *Augelli*, *supra*, n. 10; *Croake*, *supra*, n. 10; *Fisher*, *supra*, n. 10; Bogue & Fritz, The Six-Man Jury, 17 S. Dak. L. Rev. 286 (1972); Moss, The Twelve Member Jury in Massachusetts—Can it be Reduced?, 56 L. Q. 65 (1971); Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710 (1971); Zeisel, The Waning of the American Jury, 58 A. B. A. J. 367 (1972); Gibbons, The New Minijuries: Panacea or Pandora's Box?, 58 A. B. A. J. 504 (1972); Kaufman, The Harbingers of Jury Reform, 58 A. B. A. J. 695 (1972); Whalen, Remarks on Resolution of the 7th Amendment Jury Trial Requirement, 54 F. R. D. 148 (1972); Note, Right to Twelve-Man Jury, 84 Harv. L. Rev. 165 (1970); Note, Reducing the Size of Juries, 5 U. Mich. J. L. Reform 87 (1971); Note, The Effect of Jury Size on the Probability of Conviction: An Evaluation of *Williams* v. *Florida*, 27 Case W. Res. L. Rev. 529 (1971); Note, Defendant's Right to a Jury Trial—Is Six Enough?, 59 Ky. L. J. 997 (1971).

Professor Zeisel has suggested that the six-member jury is more limited than the 12-member jury in representing the full spectrum

as to whether any number less than six would suffice,[16] we conclude that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases.[17]

---

of the community, and this in turn may result in differences between the verdicts reached by the two panels. Zeisel, *supra*, 38 U. Chi. L. Rev., at 716–719.

On the other hand, one study suggests that the decrease in the size of the jury from 12 to six is conducive to a more open discussion among the jurors, thereby improving the quality of the deliberative process. Note, *supra*, 5 U. Mich. J. L. Reform, at 99–106. See also C. Joiner, Civil Justice and the Jury 31, 83 (1962) (concluding prior to *Williams* that the deliberative process should be the same in either six- or 12-member jury).

In addition, four very recent studies have provided convincing empirical evidence of the correctness of the *Williams* conclusion that "there is no discernible difference between the results reached by the two different-sized juries." Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Reform 671 (1973); Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts (1972); Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Reform 712 (1973); Bermant & Coppock, Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington, 48 Wash. L. Rev. 593 (1973).

[16] What is required for a "jury" is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. *Williams* v. *Florida*, 399 U. S., at 100. It is undoubtedly true that at some point the number becomes too small to accomplish these goals, but, on the basis of presently available data, that cannot be concluded as to the number six. See Tamm, A Proposal for Five-Member Civil Juries in the Federal Courts, 50 A. B. A. J. 162 (1964); Tamm, The Five-Man Civil Jury: A Proposed Constitutional Amendment, 51 Geo. L. J. 120 (1962).

[17] My Brother MARSHALL argues in dissent that the various incidents of trial by jury as they existed at common law are immutably saved by the Seventh Amendment's use of the word "preserved." But obviously the Amendment commands only that the *right* of trial by jury be "preserved." Since a jury of 12 is, as has been shown, not of the substance of the common law right of trial by jury and since there is "no discernible difference between the results reached

II

The statute, 28 U. S. C. § 2072, authorizes this Court to promulgate the Federal Rules of Civil Procedure but provides that "Such rules . . . shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." [16] Peti-

---

by the two different-sized juries," *Williams* v. *Florida*, 399 U. S. at 101, the use of a six-member civil jury does not impair the *right* "preserved" by the Seventh Amendment. Indeed, as my Brother MARSHALL himself recognizes, *post*, p. 14, several devices designed to improve the jury system and unknown to the common law have been approved by this Court over the years. See also Henderson, n. 7 *supra*; Scott, n. 11 *supra*. In each case, the determining factor was that the new device did not impair the *right* preserved by the Seventh Amendment. As Mr. Justice Brandeis aptly stated in response to the argument that a federal court was prevented by the Seventh Amendment from utilizing a special master because it would infringe upon the right of trial by jury:

"The command of the Seventh Amendment that 'the right of trial by jury shall be preserved' . . . does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." *Ex parte Peterson*, 253 U. S. 300, 309–310 (1920).

[16] Section 2072 is in terms applicable only to the general Federal Rules of Civil Procedure prescribed by this Court. However, 28 U. S. C. § 2071, which authorizes federal district courts to prescribe local rules of practice and procedure, see Part III, *infra*, requires such rules to be "consistent with Acts of Congress" as well as the general Federal Rules. Thus, if § 2072 prohibits a jury of less than 12, the local rule in question would conflict with an Act of Congress and would therefore be invalid. See 3A Barron & Holtzoff, Federal Practice and Procedure § 1171, at 170 (Wright ed. 1958).

tioner argues that in securing trial by jury "as at common law" and also "as declared by the Seventh Amendment," Congress meant to provide a jury having the characteristics of the common law jury even if the Seventh Amendment did not require a jury with those characteristics. As the Court of Appeals observed, "[t]his would indeed be a sweeping limitation." 456 F. 2d, at 1380. Petitioner would impute to Congress an intention to saddle archiac and presently unworkable common law procedures upon the federal courts [19] and thereby to nulify innovative changes approved by this Court over the years that have now become commonplace and, for all practical purposes, "essential to the preservation of the right" of trial by jury in our modern society. *Ex parte Peterson*, *supra*, 253 U. S., at 310; *Galloway* v. *United States*, *supra*, 319 U. S., at 390–391. For to say that Congress chose this means to render our system of civil jury trial immutable as of 1791, or some other date, is to say the Congress meant to deny the judiciary the "flexibility and capacity for growth and adaptation [which] is the peculiar boast and excellence of the common law." *Hurtado* v. *California*, 110 U. S. 516, 530 (1884); *Funk* v. *United States*, 290 U. S. 371, 382 (1933).

But petitioner's extravagant contention has not the slightest support in the legislative history of the provision. Section 2072 is derived from the Enabling Act of 1934, 48 Stat. 1064.[20] Section 2 of that Act gave this Court the "power to unite the general rules prescribed . . . for cases in equity with those in actions at

---

[19] See Henderson, n. 7 *supra*; Scott, n. 11 *supra*.

[20] See 5 Moore's Federal Practice ¶ 38.06 (2d ed. 1971). The pertinent provisions of the Enabling Act of 1934 were carried forward by the Revision Act of 1948, 62 Stat. 961, and later became § 2072 of the Judiciary Code, 28 U. S. C. § 1 *et seq.* Section 2072 has been amended several times since 1947, but none of the amendments is relevant to our present discussion.

law so as to secure one form of civil action and procedure for both." H. R. Rep. No. 1829, 73d Cong., 2d Sess., 1 (1934). As emphasized by the Court of Appeals, the language of § 2 preserving the right of trial by jury was included "to assure that with such union [of law and equity] the right of trial by jury would be neither expanded nor contracted." 456 F. 2d, at 1381, citing 5 Moore's Federal Practice ¶ 38.06, at 44 (2d ed. 1971). See also *Cooley* v. *Strickland Transportation Co.*, 459 F. 2d 779, 785 (CA5 1972). In other words, Congress used the language in question for the sole purpose of creating a statutory right coextensive with that under the Seventh Amendment itself.[21] If Congress had meant to prescribe a jury number or to legislate common law features generally, "it knew how to use express language to that effect." *Williams* v. *Florida*, 399 U. S., at 97.

III

Petitioner's argument that Local Rule 13 (d)(1)[22] is inconsistent with Fed. Rule Civ. Proc. 48 rests on the proposition that the Rule implies a direction to impanel a jury of 12 in the absence of a stipulation of the parties for a lesser number. The Rule was drafted at the time the statement in *Capital Traction Company* v. *Hof*, *supra*, that trial by jury means a "jury of twelve," was generally accepted. Plainly the assumption of the draftsmen that

---

[21] Cf. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10 (1941): "The second [proviso of the Enabling Act of 1934] is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved."

[22] This Rule was adopted pursuant to Fed. Rule Civ. Proc. 83, which in turn is derived from 28 U. S. C. § 2071:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

such was the case cannot be transmuted into an implied direction to impanel juries of 12 without regard to whether a jury of 12 was required by the Seventh Amendment. Our conclusion that the *Hof* statement lacks precedential weight leaves Rule 48 without the support even of the draftsmen's assumption and thus there is nothing in the Rule with which the Local Rule is inconsistent.[23] See *Cooley* v. *Strickland Transportation Co.*, *supra*, at 783–785; Devitt, The Six-Man Jury in the Federal Court, 53 F. R. D. 273, 274 n. 1 (1971).

---

[23] An *amicus* argues that the Local Rule is invalid under our decision in *Miner* v. *Atlass*, 363 U. S. 641 (1960). That argument is misplaced. *Miner* struck down a local rule authorizing discovery-deposition practice in admiralty cases. A court of admiralty had no inherent power, independent of statute or rule, to order the taking of depositions for the purpose of discovery. In 1939, this Court omitted this "basic procedural innovation" from among the Civil Rules adopted as part of the Admiralty Rules. *Miner* held that this omission "must be taken as an advertent declination of the opportunity to institute the discovery-deposition procedure of Civil Rule 26 (a) throughout courts of admiralty," *id.*, at 648, and therefore, for this and additional reasons stated in the opinion, that the local rule "is not consistent with the present General Admiralty Rules . . . ." *Id.*, at 647. In contrast, we hold in this case that Local Rule 13 (d) (1) is not inconsistent with Fed. Rule Civ. Proc. 48.

Amicus also suggests that *Miner* should be read to hold that all "basic procedural innovations" are beyond local rulemaking power and are exclusively matters for general rulemaking. We need not consider the suggestion because, in any event, we conclude that the requirement of a six-member jury is not a "basic procedural innovation." The "basic procedural innovations" to which *Miner* referred are those aspects of the litigatory process which bear upon the ultimate outcome of the litigation and thus, "though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine . . . ." 363 U. S., at 650. Since there has been shown to be "no discernible difference between the results reached by the two different-sized juries," *Williams* v. *Florida*, *supra*, at 101; see also n. 15, *supra*, a reduction in the size of the civil jury from 12 to six plainly does not bear on the ultimate outcome of the litigation.

Similarly, we reject the argument that the Local Rule conflicts with Rule 48 because it deprives petitioner of the right to stipulate to a jury of "any number less than twelve." Aside from the fact that there is no indication in the record that petitioner ever sought a jury of less than 12, Rule 48 "deals only with a stipulation *by* '[t]*he* parties.' It does not purport to prevent *court rules* which provide for civil juries of reduced size." *Cooley* v. *Strickland Transportation Co., supra,* at 784.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 71-1442

Roland V. Colgrove, Petitioner, v. James F. Battin, United States District Judge for the District of Montana. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 21, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE POWELL concurs, dissenting.

Rule 13 (d) of the Revised Rules of Procedure of the United States District Court of Montana provides:

> "A jury for the trial of civil cases shall consist of six persons."

Rule 48 of the Federal Rules of Civil Procedure—which came into being as a result of a recommendation of this Court to Congress which Congress did not reject*—rests on a federal statute.

The two Rules do not mesh; they collide. Rule 48 says that the only way to obtain a trial with less than 12 jurors or a verdict short of a unanimous one is by stipulation.

As MR. JUSTICE MARSHALL makes clear in his dissent, while the parties under Rule 48 could stipulate for trial by an 11-man jury, under the Montana District

*At the time the Rules of Civil Procedure became effective they had to be submitted to Congress by the Court and Congress had 90 days to reject them. 28 U. S. C. § 2072. At that time § 2072 provided that these Rules "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." It seems clear beyond peradventure that the draftsmen thought a jury of 12 was required, save as the parties by stipulation waived that right by stipulating to a lesser number.

Court rule only six jurors could be required. Since all apparently agree that the framers of Rule 48 presumed there would be a jury of 12 in the absence of stipulation, the only authority which could reduce 12 to six would be the authority that created Rule 48. Neither we nor the District Court nor the Judicial Conference or a circuit court council have the authority to make that change.

Whether the change, if made, would be constitutional is a question I therefore do not reach.

SUPREME COURT OF THE UNITED STATES

No. 71-1442

Roland V. Colgrove, Petitioner,
v.
James F. Battin, United States District Judge for the District of Montana.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 21, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, dissenting.

Some 30 years ago, Mr. Justice Black warned his brethren against the "gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway* v. *United States*, 319 U. S. 372, 397 (1943) (dissenting opinion). Today, the erosion process reaches bedrock. In the past, this Court has sanctioned changes in "mere matters of form or procedure" in jury trials, *Baltimore & Carolina Line Inc.* v. *Redman*, 295 U. S. 654, 657 (1935), and in "pleading or practice" before juries, *Walker* v. *New Mexico & Southern Pacific Co.*, 165 U. S. 593, 596 (1897). But before today, we had always insisted that "whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys [a] substantial and essential feature thereof is one abridging the right." *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 468 (1897). See also *Dimick* v. *Schiedt*, 293 U. S. 474 (1935); *Capital Traction Co.* v. *Hof*, 174 U. S. 1 (1899).

Now, however, my brethren mount a frontal assault on the very nature of the civil jury as that concept has been understood for some seven hundred years. No one need be fooled by reference to the six-man trier of fact utilized in the District Court for the District of Montana as a "jury." This six-man mutation is no more a "jury"

than the panel of three judges condemned in *Baldwin* v. *New York*, 399 U. S. 66 (1970), or the 12 laymen instructed by a justice of the peace outlawed in *Capital Traction Co.* v. *Hof*, *supra*. We deal here not with some minor tinkering with the role of the civil jury, but with its wholesale abolition and replacement with a different institution which functions differently, produces different results,[1] and was wholly unknown to the Framers of the Seventh Amendment.[2]

[1] Although I consider it ultimately irrelevant to the constitutional issue, see ——, *infra*, it is still of some interest that variations in jury size do seem to produce variations in function and result. It is, of course, intuitively obvious that the smaller the size of the jury, the less likely it is to represent a fair cross-section of community viewpoints. What is less obvious but nonetheless statistically demonstrable is that the difference between a 12-man and six-man jury in this respect is quite dramatic and likely to produce different results. Professor Zeisel, perhaps our leading authority on the civil jury, has demonstrated this fact through use of a model in which he assumes that 90% of a hypothetical community shares the same viewpoint, while 10% have a different viewpoint. Of 100 12-man juries picked randomly from such a community, 72 would have at least one member of the minority group, while of the 100 six-man juries so selected, only 47 would have minority representation. Moreover, the differences in minority representation produce significant differences in result. Professor Zeisel posits a case in which the community is divided into six groups of equal size with respect to the monetary value they place on a given personal injury claim, with one-sixth evaluating the claim at $1,000, another sixth at $2,000 etc. He also assumes that the damages a jury will award lie close to the average assessment of the damages each individual juror would choose. If one accepts these hypotheses, "[i]t is easy to see that the six-member juries show a considerably wider variation of 'verdicts' than the twelve-member juries. For instance, 68.4% of the twelve-member jury evaluations fall between $3000 and $4000, while only 51.4% of the six-member jury evaluations fall in this range. Almost 16% of the six-member juries will reach verdicts that will fall into the extreme levels of more than $4500 or less than $2500, as against only a little over 4% of the twelve-member juries. The appropriate statistical mea-

[*Footnote 2 is on p. 3*]

In my judgment, if such a radical restructuring of the judicial process is deemed wise or necessary, it should be accomplished by constitutional amendment. See, *e. g.*, Tamm, The Five-man Civil Jury: A Proposed Constitutional Amendment, 51 Geo. L. J. 120 (1962). It appears, however, that the common law jury is destined to expire not with a bang, but a whimper. The proponents of the six-man jury have not secured the approval of two-thirds of both Houses of Congress and three-fourths of the state legislatures for their proposal. Indeed, they have not even secured the passage of simple legislation to accomplish their goal. Instead, they have relied upon the interstitial rulemaking power of the majority of the district court judges sitting in a particular district to rewrite the ancient definition of a civil jury.[8]

---

ure of this variation is the so-called standard deviation. The actual distribution pattern will always depend on the kind of stratification that is relevant in a particular case, but whatever the circumstances, the six-member jury will always have a standard deviation that is greater by about 42%. This is the result of a more general principle that is by now well known to readers of such statistics as public opinion polls—namely, that the size of any sample is inversely related to its margin of error." Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 716–718 (1971).

[8] See —, *supra*.

[9] Even in the absence of constitutional difficulties, I view this course as an improper use of the local rulemaking power. In *Miner v. Atlass*, we held that the statutory procedures surrounding the rulemaking process were "designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords." 363 U. S. 641, 650 (1960). We therefore declined to construe the local rulemaking power as extending to such innovations. *Ibid.* The Court seeks to escape the force of this precedent with the assertion that "the requirement of a six-man jury is not a 'basic procedural innovation.'" I find this statement startling to say the least. Whatever one's view of the constitutionality of six-man juries, surely it cannot be doubted that this

They have done so, moreover, in the teeth of an Act of Congress and a Federal Rule promulgated by this Court which, in my judgment, were designed to guarantee the 12-man civil jury. By approving this mode of procedure, the Court turns the so-called "clear statement" rule on its head. Instead of requiring a clear statement from Congress when it legislates at the limit of its constitutional powers, see, *e. g.*, *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932), my brethren approve a departure from settled constitutional understanding despite a clear statement from Congress that it intended no such thing. I must respectfully dissent.

I

At the outset, it should be noted that the constitutional issue in this case is not settled by the prior decisions of this Court upholding nonunanimous and six-man criminal juries. See *Apodaca* v. *Oregon*, 406 U. S. 404 (1972); *Johnson* v. *Louisiana*, 406 U. S. 356 (1972); *Williams* v. *Florida*, 399 U. S. 78 (1970). This is true for at least three reasons.

First, *Apodaca*, *Johnson*, and *Williams* all involved state trials and, therefore, the requirements of the Fourteenth Amendment rather than the Sixth. This case is of course distinguishable in that it deals with a federal trial and, therefore, with Bill of Rights guarantees which are directly applicable, rather than applicable only through the incorporation process.[4] Thus, neither *Apodaca*, *Johnson*, nor *Williams* squarely presented

---

shift in a practice of seven hundred years standing, likely to affect the outcome of hundreds of cases, see n. 1, *supra*, and ——, *infra*, constitutes a "basic procedural innovation."

[4] Indeed, the Seventh Amendment is one of the few remaining provisions in the Bill of Rights which has not been held to be applicable to the States. See, *e. g.*, *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 158 (1931); *Wagner Electric Mfg. Co.* v. *Lyndon*, 262 U. S. 226, 232 (1923).

the Court with the problem of defining the meaning of jury trial in a federal context.[4] Indeed, as my Brother POWELL's concurring opinion in *Apodaca* and *Johnson* makes plain, there were, as of last Term at least, five Members of this Court who thought that the Sixth Amendment required unanimous jury verdicts in federal cases. See also *Johnson* v. *Louisiana*, *supra*, at 395 (BRENNAN, J., dissenting). MR. JUSTICE POWELL argued in that opinion that the "process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to the limitations on, that right as it was known in criminal trials at common law." 406 U. S., at 370 n. 6. He concluded that the Sixth Amendment required unanimous federal juries because "[a]t the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law." 406 U. S., at 371. See also *Williams* v. *Florida*, *supra*, at 123–125 (Harlan, J., concurring). It is apparently uncontested that in 1791, common law civil juries consisted of 12 men. See ——, *infra*. Thus, to the extent that Sixth Amendment precedent is applicable to Seventh Amendment problems, *Johnson* and *Apodaca* would seem to cut strongly in favor of a 12-man jury requirement in federal court rather than against such a requirement.

Moreover, even if it is assumed that the holdings in *Apodaca*, *Williams*, and *Johnson* are readily transferable to a federal context, it still does not follow that the definitions of trial by jury for purposes of the Sixth and

[4] The author of this opinion believes that the Fourteenth Amendment was intended to incorporate fully Sixth Amendment guarantees. See *Duncan* v. *Louisiana*, 399 U. S. 145 (1968). Nonetheless, the fact remains that this Court has yet to decide the issues posed by majority verdicts and six-man juries in a purely Sixth Amendment context.

Seventh Amendments are necessarily coextensive. The two Amendments use different language and they guarantee different rights. Indeed, as the *Williams* court itself recognized, the approval of six-man juries in criminal cases did not resolve "whether, for example, additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation." 399 U. S., at 92 n. 30.

The Court today goes to great lengths to show that the reference in the Seventh Amendment to "Suits at common law" speaks only to the type of suit in which a jury is required, not to the type of jury which is required in such suits. However, my brethren totally ignore another textual difference between the Sixth and Seventh Amendments which I consider to be of at least equal significance. Whereas the Sixth Amendment refers only to "an impartial jury," the Seventh Amendment states that "the right of trial by jury shall be *preserved*" (emphasis added). The Seventh Amendment's additional reference to the preservation of the right strongly suggests that the content of that right is to be judged by historical standards.

Certainly, that has been this Court's understanding in the past. In *Dimick* v. *Schiedt*, for example, the Court held that the Seventh Amendment "in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791," 293 U. S. 474, 487 (1935), and the dissent agreed that the purpose of the Seventh Amendment was "to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution." *Id.*, at 491. In *Baltimore & Carolina Line Inc.* v. *Redman*, the Court held that the "right of trial by jury thus preserved [by the Seventh Amendment] is the right which existed under the English common law when the Amendment was adopted." 295 U. S. 654, 657 (1935). And in *American*

Publishing Co. v. *Fisher*, the Court held that what was guaranteed by the Seventh Amendment was "the peculiar and essential features of trial by jury at the common law." 166 U. S. 464, 468 (1897). It should therefore be clear that whereas the words of the Sixth Amendment might be read as permitting a functional approach which measures "Sixth Amendment values," the Seventh Amendment requires an historical analysis geared toward determination of what the institution was in 1791 which the Framers intended to "preserve." See also *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364 (1913); *Capital Traction Co.* v. *Hof*, 174 U. S. 1 (1899).

Finally, it is important to note that whereas the legislative history of the Sixth Amendment tended to support the Court's decision in favor of six-man criminal juries, it is at best ambiguous in the Seventh Amendment context. As the Court pointed out in *Williams*, the Sixth Amendment as originally introduced by James Madison in the House provided "[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, *with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.*" 1 Annals of Cong. 435 (1789). The Amendment passed the House in this form, but when it reached the Senate, that body expressly rejected the "accustomed requisites" language, see Senate Journal, Sept. 9, 1789, 1st Cong., 1st Sess., 77, and the Amendment as ultimately adopted contained no reference to the common law features of jury trial.

In contrast, the history of the Seventh Amendment contains no express rejection of language which would fix the common law attributes of the civil jury. Indeed, as the Court itself recognizes, the extant history of the Amendment is exceedingly sketchy. See generally Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966). Undeterred by

the absence of source material, however, my Brethren concoct an elaborate theory designed to demonstrate that the Framers did not intend to fix the nature of the civil jury as it existed at common law. As I read the majority opinion, the theory is based on the following syllogism:

1. The delegates to the constitutional convention considered a clause which would have protected the right to a civil jury, but declined to adopt such a provision because state practice varied widely as to the cases in which a civil jury was provided.

2. When the Seventh Amendment was passed, Congress overrode the arguments of those opposed to a constitutional jury guarantee and decided to provide a federal right of jury trial despite differences between the States as to when jury rights attached.

3. Therefore, in the words of court "[w]e can only conclude . . . that . . . the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."

It hardly requires demonstration that this "logic" rests on the flimsiest of inferences. It simply does not follow that because the Amendment was, at one stage rejected because of disparities among the States in the instances in which the jury right attached, its scope is therefore limited to the surmounting of these disparities. Indeed, the opposite conclusion is equally plausible. One could argue that whereas there was dispute as to the cases in which the jury trial right would attach, it was common ground between opponents and proponents of the measure that when it did attach, its incidents would be as at common law. Thus, whatever the meaning of the Amendment as to jury usage, the nature of the jury is, by this argument, at its core and agreed to by all parties.

Moreover, even if the Court's chain of reasoning were correct, the argument still falls, since it is grounded on a faulty major premise. True, the opponents of a jury guarantee at the constitutional convention rested their argument in part on the varying practice in the States as to the cases in which the right of jury trial attached. But a more detailed examination of the debates than the Court's highly selective quotations permit makes clear that the opponents also rested on the differences in the characteristics of jury trial between the States. Thus, when a jury guarantee was first proposed, Mr. Gorham, one of the principal drafters of the Constitution, argued against the proposal, stating "It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter." 2 M. Farrand, Records of the Constitutional Convention 587 (1911) (hereinafter cited as Farrand). But when the proposal came to a final vote, Mr. Gorham made a somewhat different argument: "The *constitution* of Juries is different in different States." *Id.*, at 628. Similarly, while at one stage James Wilson defended the absence of a jury requirement on the ground that "the cases open to a jury, differed in different States," 3 Farrand 101, he also made a quite different argument:

> "By the constitution of the different States, it will be found that no particular mode of trial by jury could be discovered that would suit them all. The manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings, are all different, in the different States; and I presume that it will be allowed a good general principle, that in carrying into effect the laws of the general government by the judicial department, it will be proper to make regulations as agreeable

> to the habits and wishes of the particular States as possible; and it is easily discovered that it would have been impractical, by any general regulation, to have given satisfaction to all." 3 Farrand 164.

Thus, it is clear that opponents of a jury guarantee were concerned not only with the differing rules for when juries were required among the States, but also with the differing content of the jury right itself.[6] To the extent that anything at all can be inferred from the rejection of these arguments, it follows by the Court's own chain of reasoning that the Framers intended to override state differences as to both the cases in which a jury right would attach and the characteristics of the jury itself.

I should hasten to add that I do not mean to embrace that chain of reasoning. In fact, as indicated above, I view the legislative history as far too fragmentary to support any firm conclusion. But I would have thought that the very uncertainty of the legislative history would support a mode of analysis which looked to the jury as it existed at the time the Seventh Amendment was written in order to determine the intent of the Framers. As Mr. Justice Harlan argued

> "it is common sense and not merely the blessing of the Framers that explains this Court's frequent reminders that: 'The interpretation of the Constitution of the United States is necessarily influenced by the

[6] See also George Washington's contemporaneous explanation in a letter to Lafayette for the absence of a jury guarantee ("[i]t was only the difficulty of establishing a mode which would not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment") 3 Ferrand 298; and Edmund Randolph's explanation to the Virginia Convention ("I will risk my property on the certainty, that [Congress] will institute the trial by jury in such manner as shall accommodate the conveniences of the inhabitants of every state; the difficulty of ascertaining this accommodation, was the principal cause of its not being provided for") 3 Ferrand 309.

fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' *Smith* v. *Alabama*, 124 U. S. 465, 478 (1888). This proposition was again put forward by Mr. Justice Gray speaking for the Court in *United States* v. *Wong Kim Ark*, 169 U. S. 649 (1898) where the Court was called upon to define the term 'citizen' as used in the Constitution. 'The Constitution nowhere defines the meaning of these words [the Citizenship Clause] . . . . In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.' 160 U. S., at 654. History continues to be the wellspring of constitutional interpretation. Indeed, history was even invoked by the Court in such decisions as *Townsend* v. *Sain*, 372 U. S. 293 (1963) and *Fay* v. *Noia*, 372 U. S. 391 (1963), where it purported to interpret the constitutional provision for habeas corpus according to the 'historic conception of the writ' and took note that the guarantee was one rooted in the common law and should be so interpreted. Cf. *United States* v. *Brown*, 381 U. S. 437, 458 (1965)." *Williams* v. *Florida*, *supra*, at 123–124.

When an historical approach is applied to the issue at hand, it cannot be doubted that the Framers envisioned a jury of 12 when they referred to trial by jury. It is true that at the time the Seventh Amendment was adopted, jury usage differed in several respects among the States. See generally Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966). But, for the most part at least, these differences did not extend to jury size which seems to have been uniform and, indeed, had remained so for centuries. One authority has noted that as early as 1164, the Constitu-

tions of Clarendon provided that "where, in the case of a layman so rich and powerful that no individual dares to appear against him, 'the sheriff shall cause twelve legal men of the neighbourhood, or of the vill, to take an oath in the presence of the bishop that they will declare the truth about it.'" Wells, The Origin of the Petit Jury, 27 L. Q. Rev. 347 (1911). As Professor Scott wrote, "At the beginning of the thirteenth century twelve was indeed the usual but not the invariable number. But by the middle of the fourteenth century the requirement of twelve had probably become definitely fixed. Indeed this number finally came to be regarded with something like superstitious reverence." A. Scott, Fundamentals of Procedure in Actions at Law 75–76 (1922) (footnotes omitted). See also 1 W. Holdsworth, A History of English Law 324–325 (7th ed. 1956).

To be sure, not every element of English common law was carried over without change in the colonies. In the case of jury trial, however, "in general this venerable and highly popular institution was adopted in the colonies in its English form at an early date." Reinsch, The English Common Law in the Early American Colonies 412, in 1 Selected Essays in Anglo-American Legal History (1907). As the Court concluded in *Williams* v. *Florida*, "[t]he States that had adopted Constitutions by the time of the Philadelphia Convention in 1787 appear for the most part to have either explicitly provided that the jury would consist of 12, see Va. Const. of 1776, § 8, in F. Thorpe, Federal and State Constitutions 3813 (1909), or to have subsequently interpreted their jury provisions to include that requirement." 399 U. S., at 77–78 n. 45.[7]

[7] I do not means to suggest that isolated experiments with juries of different sizes cannot be found in colonial history. Indeed, when one considers the number of jurisdictions and the span of time involved, it would be surprising if there were no abberations. Some

On the basis of this historical record, this Court has more than once concluded that the Seventh Amendment guarantees the preservation of 12-man juries.

As the Court, speaking through Mr. Justice Gray, said in *Capital Traction Co.* v. *Hof*,

> "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American

---

scholars have argued from the few cases involving juries consisting of more or less than 12 that there was no common law requirement as to jury size in the colonies. See, *e. g.*, Fisher, The Seventh Amendment and the Common Law: No Magic in Numbers, 56 F. R. D. 507 (1973). In fact, however, the cases cited for this proposition seem to constitute no more than the exceptions which prove the rule.

Fisher, for example, bases his thesis on the fact that Maryland used a jury of 10 in one case in 1682 and a jury of 11 in another case that year and that Delaware used juries of 11, 7, and 13 in three cases tried between 1676 and 1705. See *id.*, at 530. But when one remembers that thousands of civil and criminal cases were tried during the prerevolutionary period, these five apparently isolated instances prove virtually nothing. Similarly, South Carolina's provision for a jury of less than 12 in the "Court for the Trial of Slaves and Persons of Color," *ibid.*, was obviously limited to the peculiar circumstance of persons who, at that time, were considered to be without civil rights of any kind. Fisher's reliance on petitions from the citizens on Anson, Orange, and Rowan counties for juries of less than 12, *ibid.*, is unaccountable since these petitions were in fact rejected and the smaller juries never instituted. See *id.*, at n. 87.

Fisher's final example is particularly revealing. Just prior to the Revolution, New Jersey passed an act providing for six-man juries in small court cases. *Id.*, at 531. The law was challenged in the case of *Holmes* v. *Walton*, in 1780, in which the defendant argued "the jury sworn to try the above cause and on whose verdict judgment was entered consisted of six men only, when by the laws of the land it should have consisted of twelve men." *Id.*, at 532 n. 88. The New Jersey Supreme Court rejected this argument and upheld the verdict. A scant month later, however, the New Jersey Legislature reversed this decision and reinstituted the right to 12-man juries. *See ibid.*

> Constitution is . . . a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict. . . . This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books." 174 U. S. 1, 14 (1899).

Cf. *Patton* v. *United States*, 281 U. S. 276 (1930); *Maxwell* v. *Dow*, 176 U. S. 581 (1900); *American Publishing Co.* v. *Fisher*, 166 U. S. 464 (1897); *Springville* v. *Thomas*, 166 U. S. 707 (1897).

The Court today elects to abandon the certainty of this historical test, as well as the many cases which support it, in favor of a vaguely defined functional analysis which asks not what the Framers meant by "trial by jury" but rather whether some substitute for the common law jury performs the same functions as a jury and serves as an adequate substitute for one. It is true that some of our prior cases support a functional approach to an evaluation of procedural innovations which surround jury trials. The Court has in the past upheld such devices as jury interrogatories and reports of special masters as not interfering with the functioning of a common law jury. See, *e. g.*, *Ex parte Peterson*, 253 U. S. 300 (1920); *Walker* v. *New Mexico & Southern Pacific Railroad Co.*, 165 U. S. 593 (1897). But see *Dimick* v. *Schiedt*, 293 U. S. 474 (1935). But I know of no prior case which has utilized a functional analysis to evaluate the very composition of the civil jury.

I submit that the reason for the absence of such cases derives from the inherent nature of the problem. It is possible to determine in a principled fashion whether the appurtenances which surround a jury interfere with

the essential functioning of that institution. One can evaluate whether additur, for example, or directed verdicts interfere with the jury's role as it existed at common law. See, *e. g.*, *Galloway* v. *United States*, 319 U. S. 372 (1943); *Dimick* v. *Schiedt*, 293 U. S. 474 (1935). But the composition of the jury itself is a matter of arbitrary, *a priori* definition. As Mr. Justice Harlan argued "[t]he right to a trial by jury . . . has no enduring meaning apart from historical form." *Williams* v. *Florida*, 399 U. S. 78, 125 (1970) (concurring opinion). It is senseless, then, to say that a panel of six constitutes a "jury" without first defining what one means by a jury, and that initial definition must, in the nature of things, be arbitrary. One could, of course, define the term "jury" as being a body of six or more laymen. But the line between five and six would then be just as arbitrary as the line between 11 and 12. There is no way by reference to abstract principle or "function" that one can determine that six is "enough," five is "too small," and 20 "too large."[8] These evaluations can only be made by reference to a hypothetical ideal jury of some arbitrarily chosen size. All one can say is that

[8] The Court asserts that "what is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community." See —— n. 16, *supra*. We can bypass for the moment the intriguing question of where the majority finds this requirement in the words of the Seventh Amendment. For our purposes, it is sufficient to note that, upon examination, this "test" turns out to be no test at all. It may be that the ideal jury would provide "enough" group deliberation and community representation. But the question in this case is how much is "enough." Obviously, the larger the jury the more group representation it will provide. See n. 1, *supra*. Merely observing that a certain level of group representation is constitutionally required fails to tell us what that level is. And, more significantly, it fails to tell us how to go about deciding what that level is.

a jury of six functions less like a jury of 12 than would a jury of, say eight, but more like a jury of 12 than would a jury of three.* Although I think it clear that my brethren would reject, for example, a jury of one, the Court does not begin to tell us how it would go about drawing a line in a nonarbitrary fashion, and it is obvious that in matters of degree of this kind, nonarbitrary line drawing is a logical impossibility.

Of course, there is nothing intrinsically wrong with drawing arbitrary lines and, indeed, as argued above, in order to resolve certain problems they are essential. Thus, this Court has not hesitated in the past to rely on arbitrary demarcations in cases where constitutional rights depend on matters of degree. See, e. g., *Burns* v. *Fortson*, — U. S. —, — (1973). But in cases where arbitrary lines are necessary, I would have thought it more consonant with our limited role in a constitutional democracy to draw them with reference to the fixed bounds of the Constitution rather than on a wholly ad hoc basis.

I think history will bear out the proposition that when constitutional rights are grounded in nothing more solid than the intuitive, unexplained sense of five justices that a certain line is "right" or "just" those rights are certain to erode and, eventually, disappear altogether. Today, a majority of this Court may find six-man juries to represent a proper balance between competing demands of expedition and group representation. But as dockets become more crowded and pressures on jury trials grow, who is to say that some future Court

---

* It thus will not do to argue, as has my Brother WHITE, that one "can get off the 'slippery slope' before he reaches the bottom. . . ." *Williams* v. *Florida*, *supra*, at 91 n. 28. This begs the question how one knows at what point to get off—a question for which the Court apparently has no answer.

will not find three, or two, or one a number large enough to satisfy their unexplicated sense of justice? It should be clear that constitutional rights which are so vulnerable to pressures of the moment are not really protected by the Constitution at all. As Mr. Justice Black never tired of arguing, "the accordian-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights." *Rochin* v. *California*, 342 U. S. 165, 177 (1952) (Black, J., concurring). See also *Duncan* v. *Louisiana*, 391 U. S. 145, 169 (1968) (Black, J., concurring).

Since some definition of "jury" must be chosen, I would therefore rely on the fixed bounds of history which the Framers, by adopting the Seventh Amendment, meant to "preserve." I agree with MR. JUSTICE POWELL'S observation in the Sixth Amendment context that determining the content of the right to jury trial should involve a "careful evaluation of, and strict adherence to the limitations on, that right as it was known . . . at common law." *Johnson* v. *Louisiana*, 406 U. S. 356, 370 n. 6 (concurring opinion). It may well be that the number 12 is no more than an "historical accident" and is "wholly without significance 'except to mystics.'" *Williams* v. *Florida*, *supra*, at 102. But surely there is nothing more significant about the number six, or three, or one. The line must be drawn somewhere, and the difference between drawing it in the light of history and drawing it on an ad hoc basis is, ultimately, the difference between interpreting a constitution and making it up as one goes along.

II

The arbitrary nature of the line which must be drawn in determining permissible jury size highlights another anomaly in the Court's opinion. Normally, in our system we leave the inevitable process of arbitrary line

drawing to the legislative branch which is far better equipped to make ad hoc compromises. In the past, we have therefore given great deference to legislative decisions in cases where the line must be drawn somewhere and cannot be precisely delineated by reference to principle. This Court has involved itself in the sticky business of separating cases along a continuum only when the Constitution clearly compels it to do so and when the legislature has plainly defaulted.

Today, the Court turns this practice inside out. It rejects what I take to be a clearly articulated legislative decision—a decision, incidentally, which is fully consonant with constitutional requirements—in order to draw its own arbitrary line. It does so, moreover, without any explanation for why it finds the legislative determination unsatisfactory and, indeed, with barely any explanation at all.

A

Title 28 U. S. C. § 2072 requires that the Rules of Civil Procedure promulgated by this Court "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." As the Court recognizes, this requirement is made applicable to local rules of procedure by 28 U. S. C. § 2071 which requires that "[s]uch rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

The Court's treatment of this statutory requirement is, to say the least, peculiar. When explicating the Seventh Amendment, my Brethren hold that the Framers intended to govern only the types of trials in which the jury right attaches rather than to fix the common law characteristics of the jury. Their reason for reaching this conclusion is that the Seventh Amendment, by its terms, guarantees the right to a jury trial "[i]n suits at common law" and not as it existed at common law.

This language, the Court says, "is not directed to jury characteristics such as size, but rather defines the kind of cases for which jury trial is preserved, namely, 'suits at common law.'" ——, *supra*. This argument from the language of the Seventh Amendment is fair enough, although for the reasons given in the preceding section, I find it ultimately unpersuasive. But what then are we to say when interpreting a provision which guarantees jury trials not "in suits at common law," but "as at common law." By the Court's own reasoning, it would seem that this phrase should be read to guarantee the preservation of jury characteristics as they existed at common law.

Uninhibited by the seeming restraints of its own logic, however, my Brethren proceed to read this phrase to preserve juries in cases tried at common law in the face of the merger of law and equity. But if we are again to take the Court at its own word, this is precisely the result achieved by the Seventh Amendment of its own force. There is, of course, a well recognized canon of construction which requires courts to read statutory provisions so that, when possible, no part of the statute is superfluous. See, *e. g.*, 2 J. Sutherland, Statutes and Statutory Construction § 4705 (3d ed. 1943), and cases cited therein. Yet the Court's reading of this statute creates not just a redundancy, but a double redundancy. If the framers of § 2072 had intended merely to preserve jury trials in cases at common law, then no statute at all would have been necessary since, as the Court recognizes, the Seventh Amendment by itself is sufficient to accomplish this purpose. Yet Congress not only passed a statute—it adopted a provision securing trial by jury both "as declared by the Seventh Amendment" and "as at common law." If one accepts for the moment the Court's premise that the Seventh Amendment preserves only the right to juries in common law cases,

Congress' addition of the phrase "as at common law" is explicable only if the legislature also intended to protect jury characteristics from change.

My Brethren chose to reject this clear meaning of the statute and to read it instead in a manner which not only makes it redundant but also, as demonstrated in the previous section, raises the gravest constitutional questions. Yet the only argument I can discern for reaching this result is the Court's stated reluctance to "saddle archaic and presently unworkable common law procedures upon the federal courts." With all respect, I had not thought it our function to determine which statutory requirements are "archaic" and "unworkable" and to enforce only those which we find to be efficient and up-to-date. The Court asserts that "[i]f Congress had meant to prescribe . . . common law features [for juries] . . . 'it knew how to use express language to that effect.'" But I for one would be hard pressed to think of language which more expressly guarantees the jury's common law features than the statement that the right of trial by jury shall be preserved "as at common law." So long as this is the command of Congress, I had thought it our duty to obey, no matter how "archaic" and "unworkable" the statutory requirement.

B

Nor is the statute the end of the matter. Fed. Rule Civ. Proc. 48 provides in relevant part that "the parties may stipulate that the jury shall consist of any number less than twelve." It hardly need be demonstrated that this provision is flatly inconsistent with Local Rule 13 (d) (1). The number 11, for example, falls within the class of "any number less than twelve," so that Rule 48 requires that the parties be permitted to stipulate to a jury of 11. Yet the local rule, which requires that "[a] jury for the trial of civil cases shall consist of six per-

ress" clearly would not permit a jury of 11, even if the parties stipulated to such a jury.

The Court's contention that Rule 48 "deals only with a stipulation by '[t]he parties'" and "does not purport to prevent court rules which provide for civil juries of reduced size," *supra*, at —, therefore passes my understanding. It is true enough that Rule 48 deals with stipulations by the parties, but it expressly says that the court rules must permit such stipulations so long as the number stipulated is "any number less than twelve." Since the numbers seven through 11 are numbers less than 12, and since the local rule does not permit stipulations of these numbers, the two rules are in conflict and the local rule must therefore fall. See 28 U. S. C. § 2071; Fed. Rule Civ. Proc. 83.

Of course, Rule 48 does not on its face guarantee a jury of 12. That function is arguably performed by Rule 38 (a) which provides that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." But as the Court itself recognizes, the framers of Rule 48 clearly presupposed a jury of 12 in the absence of stipulation. Indeed, there is no way to make sense of a provision which permits stipulations of any number less than 12 unless one assumes that in the absence of a stipulation, the jury would consist of 12. I am thus once again at a loss to understand why the Court strains to escape the plain intention of the Rule's drafters in order to wrestle with grave constitutional questions that could easily have been avoided.

III

It might appear to some anomalous after *Williams* to hold that 12-man civil juries are constitutionally required in federal cases. As Judge Wisdom has argued, "whatever one considers the role of a civil jury and whatever

importance attaches to that role, . . . no one has ever contended that the function of the civil jury is *more* important than that of the criminal jury." *Cooley* v. *Strickland Transportation Co.*, 459 F. 2d 779, 781 (1972).

There is, of course, force to that point and a certain rudimentary logic to the proposition that if a man is entitled to a jury of only six when his very liberty is at stake, he should not be entitled to more when mere property hangs in the balance. But our function is limited to interpreting the Constitution. We are not empowered to decide as a matter of policy the cases in which 12-man juries should be guaranteed. As argued above, our prior decision on jury size arose in the state context and involved interpretation of a different constitutional provision. That decision simply does not require that we approve six-man federal juries in civil cases. As Mr. Justice Sutherland observed almost 40 years ago when the common law jury was under attack from a different source, "this Court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of fundamental law of the land." *Dimick* v. *Schiedt*, 293 U. S. 474, 485 (1935).

I find that response dispositive. The Constitution is, in the end, a unitary, cohesive document and every time any piece of it is ignored or interpreted away in the name of expedience, the entire fragile endeavor of constitutional government is made that much more insecure. This observation is as pertinent to the Seventh Amendment as it is to the First, or Fourteenth, or any other part of the Constitution. Indeed, as the *Dimick* court held, "[m]aintenance of the jury as a fact-finding body is of

such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Id.*, at 486. In my judgment, my Brethren have not given this curtailment of the jury right the careful scrutiny which the problem demands. I must, therefore, respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 71–1442

Roland V. Colgrove, Petitioner, *v.* James F. Battin, United States District Judge for the District of Montana.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 21, 1973]

MR. JUSTICE POWELL, dissenting.

I share the view of MR. JUSTICE DOUGLAS that Local Rule 13 (d)(1) is incompatible with the Federal Rules of Civil Procedure, and this would require a reversal of the present case. Accordingly I do not reach the constitutional issue under the Seventh Amendment which is addressed by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in their scholarly opinions, *supra*, at —— and ——. Cf. *Johnson* v. *Louisiana*, 406 U. S. 356, 366–380 (1972) (concurring opinion).